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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC., PETITIONER,

vs.

DREW PEARSON, ROBERT S. ALLEN, AND VAN REES PRESS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JULY 25, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1938.
—8172

United States Court of Appeals for the District of Columbia

a. District Court of the United States for the District of Columbia.

No. 55429

In Equity

THE WASHINGTONIAN PUBLISHING CO. INC., *Plaintiff*,

vs.

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., and VAN REES PRESS, INC., *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 Filed March 8, 1933

In the Supreme Court of the District of Columbia

Holding An Equity Court

No. 55429

THE WASHINGTONIAN PUBLISHING CO. INC., *Plaintiff*,

vs.

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., VAN REES PRESS, INC., *Defendants*.

Bill of Complaint

To the Supreme Court of the District of Columbia:

The bill of complaint herein complains of the defendants and respectfully alleges:

1. That the complainant is, and at all of the times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and has maintained a place of business at 1703 L

Street, N. W., in the City of Washington, District of Columbia, where it has been engaged in the publishing business, and in furtherance of such business has printed and sold to the public for profit a certain magazine known as "The Washingtonian", and has operated and is operating its business under the name and style of "The Washingtonian Publishing Co. Inc." and that it sues herein in its own behalf, as will be hereinafter set out and shown to the court.

2. The defendant, Drew Pearson, and the defendant, Robert S. Allen, are residents of the District of Columbia and are sued in their own right.

3. Upon information and belief, that the defendant, Liveright, Inc., at all the times hereinafter mentioned was and is a corporation existing under the laws of the State of New York, and had and has its principal office and place of business at 31 West 47th Street, in the Borough of Manhattan, City, County and State of New York, where at all the times hereinafter mentioned it has been and is now engaged for profit in the publication, sale and distribution to the public of books and other literary matter.

4. Upon information and belief, that the defendant, Van Rees Press, Inc., was, at all the times herein mentioned, and still is a corporation organized and existing under the laws of the State of New York, and has, and has had at all the times hereinafter mentioned, its principal place of business at 508 West 26th Street, Borough of Manhattan, City, County and State of New York, where it has been and is engaged in the business of printing books, pamphlets and other literary material for profit, and in furtherance of, and in carrying out, its said business, has from time to time printed certain literary matter for the defendant, Liveright, Inc. as publisher, as will more fully hereinafter appear.

5. That this action is brought and the jurisdiction of this Court is invoked under the Copyright statutes of the United States, being the Act of March 4, 1909, as amended by the Acts of August 24, 1912, March 2, 1913, March 28, 1914 and December 18, 1919 (hereinafter called the Copyright Act), for the unlawful acts and conduct of, and the infringement of the copyrights described herein and the violation of the rights of the complainant by, the defendants and each of them, as hereinafter set forth.

6. That from a time previous to the year 1931 and for some time thereafter, the contents of the said magazine "The Washingtonian", published by the complainant as aforesaid, consisted of original articles and literary works and compositions which had been purchased by the complainant from their respective authors and published monthly by the complainant in said periodical "The Washingtonian", of which the complainant was the proprietor and publisher and which had a paid circulation of upwards of ten thousand (10,000) copies per month during each month of the year 1931.

7. On information and belief, that prior to the month of December 1931, one Rixie Smith, under the nom de plume of Linthicum Hall, wrote, composed and created a new and original article of artistic literary value and merit entitled, "The Mills—of the Gods." A copy of said original article is hereto annexed marked Exhibit A and made a part of this complaint.

8. Complainant avers upon information and belief that the information and materials contained in the said article were selected and arranged with great care and labor, and embodied and written in the style, words and language of the said Rixie Smith, and that the said Smith was the original inventor and author of the written matter contained in said article.

9. That on or about the 15th day of November 1931, the said Rixie Smith, for a valuable consideration, did sell, convey and assign to the complainant the said article entitled "The Mills—of the Gods."

10. That the article so purchased, entitled "The Mills—of the Gods" was thereafter published in print in the month of December 1931, under the title "The Mills—of the Gods (under the name of Linthicum Hall as the author, which name was the pen name or pseudonym adopted and used by the said Rixie Smith), in and as a part of the number of the said "The Washingtonian" for December 1931, by the complainant.

11. That the said number of "The Washingtonian" for December 1931 was a volume of about forty printed pages and consisted of the said article entitled "The Mills—of the Gods", written by the said Rixie Smith (under the pseudonym or pen name of Linthicum

Hall) therein published as aforesaid, and other literary compositions.

12. That for the purpose of securing copyright in "The Washingtonian" for the month of December 1931, the complainant (as required by Section 19 of the Copyright Act) did cause to be printed on the title page of each and every copy of the said issue of "The Washingtonian" for the month of December 1931, published and offered for sale in the United States, a notice and claim of copyright (pursuant to Sections 9 and 19 respectively of the Copyright Act) as follows:

"Published monthly by Marion Banister for the Washingtonian Publishing Co. Publication office Eckington Place and Florida Avenue, N. E., Editorial offices 1703 L Street, N.W., Washington, D. C. Copyrighted 1931 by The Washingtonian Publishing Co."

13. That after publication of the said issue of "The Washingtonian" for December 1931, with the notice and claim of copyright as hereinbefore set forth, the complainant (pursuant to Section 12 of the Copyright Act), on or about the 21st day of February 1933, caused to be deposited in the Copyright Office at Washington, D. C. two complete copies of the best edition then published of the said issue of "The Washingtonian" for the month of December 1931, which said two copies so deposited were entered on the records of the Copyright Office by the Register of Copyrights as Class "B No. 181717", as more fully appears by the Certificate of Registration under the seal of the Copyright office, issued by the said Register of Copyrights (pursuant to Section 55 of the Copyright Act). A copy of said Certificate is hereto annexed marked Exhibit B and made a part of this complaint. The fee prescribed by Section 51 of the Copyright Act for the registration of the said two copies of the issue of "The Washingtonian" for December 1931, deposited as hereinbefore alleged, was paid by the complainant.

5 14. That the said issue of "The Washingtonian" for December 1931 was printed from plates made in the United States and from type set within the limits of the United States, and that the printing of the text, including illustrations and binding of the said issue of "The Washingtonian" for December 1931 were performed within the

limits of the United States, as required by Section 15 of the Copyright Act, and the complainant has done all acts and things and has fully complied with all of the requirements of law necessary to establish its rights under the Copyright Act to copyright in said issue of "The Washingtonian" for December 1931, including copyright in and to the said Article, "The Mills—of the Gods".

15. That by reason of the said premises the complainant acquired the sole liberty and exclusive right of printing, reprinting, publishing, copying, vending, dramatizing and translating, in whole and in part, the literary work and material printed and contained in the said issue of "The Washingtonian" for December 1931, including the said article entitled "The Mills—of the Gods" (Exhibit A) for a term of twenty-eight years from the 10th day of December 1931, the date of copyright as aforesaid.

16. That the said article, "The Mills—of the Gods", because of its literary and artistic merit and unique treatment and presentation, gained wide discussion, vogue and celebrity in the United States upon its publication in the said issue of "The Washingtonian" for December 1931.

17. Upon information and belief, that heretofore and prior to the first day of February 1933, the defendants, without the knowledge and consent of the complainant and in infringement of the copyright hereinbefore described, and in violation of the rights of the complainant in and to the said article "The Mills—of the Gods" (Exhibit A), and at divers times since said date, at the City of New York, in the State of New York, and at other places, the de-
6 fendants have edited, published, printed and sold to the public and for profit, a literary work in one volume, and which is now so done, under the title of "More Merry-Go-Round", purporting to be written by an anonymous author and intended to be sold and which is now being sold to the public as an original and copyrighted work. That in making, editing, publishing and selling to the public as aforesaid and for profit the said book entitled "More Merry-Go-Round", the defendants, and each of them, have caused to be printed, published and sold as a part of said book "More Merry-Go-Round" the aforesaid article "The Mills—of the Gods", which is copied verbatim ad literatim from said article, the property of the complainant as afore-

said, and appears in defendant's volume "More Merry-Go-Round" under the chapter title, "The Wizards of Reconstruction", as set out in a copy thereof marked Exhibit A and hereby made a part of this complaint. That in so publishing the complainant's said article, "The Mills—of the Gods", as a part of the book entitled "More Merry-Go-Round", under the chapter title "The Wizards of Reconstruction" as aforesaid, the defendants, and each of them, have pirated, plagiarized, appropriated, stolen, imitated, copied, recomposed and arranged the essence and substance of complainant's said article, including the entire theme, treatment, characters, characterizations, episodes and features arranged in the same order and sequence, and all of the ideas invented, devised, written, composed and created by the said Rixie Smith in the said article so copyrighted by the complainant as aforesaid.

18. Upon information and belief, that since on or about the 1st day of January 1932, the defendants, and each of them, have printed, published, sold, distributed and circulated, and have caused and still cause to be printed, published, sold, distributed and circulated to the public for profit, the said book, "More Merry-Go-Round", throughout the United States, and falsely and unlawfully hold out and represent to the public, in advertising and publicity and otherwise, that the said book "More Merry-Go-Round" is an original work in its entirety, when in truth and in fact, as the defendants and each of them well know, the said book

"More Merry-Go-Round", and in particular the said
7 chapter therein contained called "The Wizards of Reconstruction", unlawfully and illegally imitates, appropriates, plagiarizes, copies and reproduces the complete essence and substance of the complainant's article entitled "The Mills—of The Gods".

19. The plaintiff is informed and believes and therefore avers that the defendants, Drew Pearson and Robert S. Allen, did on or before the month of January 1932 and after the issue of the said publication or magazine for the month of December 1931, purloin and pirate the said article contained in said December issue of said publication or magazine entitled "The Mills—of The Gods" without the consent of plaintiff and without first having attempted to obtain such consent and did purposefully and with intent to

defraud the plaintiff appropriate the said article to their own use and benefit by using and including it in the preparation by them of a manuscript of the said book "More Merry-Go-Round" and did pursuant to said piratical intent engage the defendants, Liveright, Inc. and Van Rees Press, Inc. to edit, publish, sell and distribute said book containing the said article of the plaintiff as a part thereof against the provisions of said copyright law as aforesaid.

20. That complainant's said article entitled "The Mills—of the Gods" is duplicated both in theme and in form in the chapter entitled "The Wizards of Reconstruction" of said book entitled "More Merry-Go-Round" where it is used in toto and to which it has been transferred with careful exactitude, as will appear from an inspection of Exhibits A and C annexed to this complaint.

21. Upon information and belief, that one, Drew Pearson, prepared or assisted in preparing the alleged original anonymous manuscript of the said book "More Merry-Go-Round", and that prior to the appearance and publication of said book and prior to the 1st day of December 1931, the said Pearson was associated with the complainant in and about the preparation of the material to be contained and published in the said issue of complainant's said magazine "The Washingtonian" for the month of December 1931, and that as such associate, and in the course of his said association, the said Pearson had full access to the said article "The Mills—of the Gods", and knew that the
8 same was the copyrighted property of this complainant. That notwithstanding such knowledge, the said Pearson knowingly, fraudulently and maliciously did conspire with the defendants to pirate and appropriate as their own the said article "The Mills—of the Gods" and to publish and print the same as a part of said book "More Merry-Go-Round", in disregard and violation of the sole proprietary right of complainant in and to said article as hereinabove set out.

22. In consideration whereof and because the complainant cannot have adequate relief except in a Court of Equity and in this Court, the complainant prays that—

(1) There be issued out of and under the seal of this Honorable Court a writ of subpoena directing and ordering the defendants herein to appear and answer this bill of com-

plaint, but not under oath, the oath being hereby waived, and to abide by and perform such other orders and decrees as may be made herein.

(2) The said defendants and each of them, their servants, agents, attorneys, employees and confederates be forthwith restrained by injunction temporarily pending final decree in this action, and perpetually thereafter, from publishing, printing, editing, selling, distributing or circulating to the public for profit or otherwise, the said book "More Merry-Go-Round", or any other imitation, copy or reproduction of the complainant's said article "The Mills—of the Gods" or any material part thereof.

(3) The defendant be required to deliver to the United States Marshal all of the copies of said book "More Merry-Go-Round" now in their possession or under their control, or the possession and/or control of either of them, and that the said Marshal be instructed and commanded to destroy the same pursuant to the statutes made and provided in such case.

(4) That the defendants and each of them be decreed to render an accounting to all of the receipts and profits which have accrued or are to accrue to them or either of them by reason of the said premises, and to pay the same over
9 to the complainant together with such damages which the defendants have caused to the complainant by their said illegal and unlawful acts; or

(5) At the election of complainant, that the defendants and each of them be directed to pay to the complainant the sum of One Dollar ($1.00) per copy of each printed sheet of infringing material contained in the said book "More Merry-Go-Round", and to pay to the complainant the costs of this suit.

(6) That complainant may have such other and further relief in the premises as may be equitable and as the nature of the case may require.

THE WASHINGTONIAN PUBLISHING CO., INC.
By: MRS. BLAIR BANISTER
Vice President

ALAN B. DAVID
GIBBS L. BAKER
Attorneys for Complainant

DISTRICT OF COLUMBIA, *ss:*

Mrs. Blair Banister, being duly sworn, deposes and says that she is the Vice President of The Washingtonian
10 Publishing Co. Inc. the complainant in the within action.

That she has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to her own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to these matters she believes it to be true.

That the reason why this verification is made by deponent and not by complainant is because the complainant is a corporation and deponent is one of its officers, to wit, its Vice-President.

MRS. BLAIR BANISTER

GIBBS L. BAKER
ALAN B. DAVID
Attorneys for plaintiff

Sworn to before me this 8th day of March, 1933.

FRANK E. CUNNINGHAM,
Clerk

By HARRY M. HULL,
Asst. Clerk

11 Filed April 25, 1933

Joint and Several Answer to Bill of Complaint

* * * * * * * * *

The defendants, Drew Pearson, Robert S. Allen, Liveright, Inc., and Van Rees Press, Inc., for their joint and several answer to the Bill of Complaint of the Plaintiff, the Washingtonian Publishing Company, Inc., or such parts thereof as they are advised it is material and necessary for them to answer, say:

1. That they have no knowledge of the facts set forth in Paragraph 1 of the Bill of Complaint and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

2. That they admit the allegations of Paragraph 2 of the Bill.

3. That they admit the allegations of Paragraph 3 of the Bill.

4. That they admit the allegations of Paragraph 4 of the Bill.

5. That they have no knowledge of the facts set forth in Paragraph 5 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

6. (a) That they have no knowledge of the facts set forth in Paragraph 6 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

(b) That for further answer to Paragraph 6 of the Bill, defendant Pearson states that in June, 1931, one Frederick G. Brownell discussed with him the possibility of raising funds for "The Washingtonian", a monthly magazine published by plaintiff, and asked him to interest himself in the project; that subsequently one Marion (Mrs. Blair) Banister, who was designated the editor of The Washingtonian, urged that he assist in refinancing the publication, which was at that time seriously embarrassed by the impending receivership of the Mayflower Hotels Corporation of America which, as owner of the majority of the capital stock of the Publishing Company, had subsidized the publication; that the said Banister and Brownell, together with defendant Pearson, concluded to experiment with the publication of one or two issues of the magazine under a new editorial policy, and the printers, who were the largest creditors of the company, agreed to participate; that two issues, namely, October and November, 1931, were published under the editorial direction of defendant Pearson, with the cooperation of the said Banister and Brownell; that defendant Pearson then sought to purchase the assets of the Publishing Company but his offer was refused by the receivers of the Mayflower Hotels Corporation of America and he thereupon severed his connection with The Washingtonian and has since that time had nothing whatsoever to do with it; that during his connection with the magazine, defendant Pearson received no compensation whatsoever, but instead paid out of his own funds for several literary and art contributions which he secured and which added greatly to the success of the issues; that the magazine itself had no funds with which to pay for contributions because,

under the arrangement by which the printers were continuing publication, it was necessary to transfer to the printers all receipts from advertising and sales of copies; that the October and November, 1931, issues of The Washingtonian carried a notice of copyright, but application for registration thereof was not made at that time, and, in fact, was never made during the life of the publication, all of which will more fully hereinafter appear.

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7. (a) That defendant Pearson admits the allegation of Paragraph 7 except as to the originality of the article "The Mills—of the Gods", and states that this article was jointly conceived by Rixie Smith and himself.

(b) That defendants, Allen, Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 7 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

8. That they have no knowledge of the facts alleged in Paragraph 8 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

9. That upon information and belief they deny the allegations of Paragraph 9 that the said Rixie Smith did, for a valuable consideration, sell, convey and assign the said article "The Mills—of the Gods", to plaintiff, and, in further answer thereto, state, upon information and belief, that the said Smith received no compensation whatsoever from The Washingtonian for the said article; that the only compensation which the said Smith received was a payment made by defendant Pearson to the said Smith on July 22, 1932, for the use of the article in the publication known as "More Merry-Go-Round".

10. (a) That the defendants Pearson and Allen admit the allegations of Paragraph 10 of the Bill, except as to the purchase of the said article, and state, upon information and belief, that the plaintiff never completed the purchase of the said article by any payment to the said Smith therefor.

(b) That the defendants Liveright and Van Rees Press, Inc., have no knowledge of the facts alleged in Paragraph 10 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

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(c) In further answer to Paragraph 10, the defendant Pearson states, upon information and belief, that the De-

cember, 1931, issue of The Washingtonian was published without authority in that The Washingtonian Publishing Company was owned and controlled by the Mayflower Hotels Corporation of America, which was then being operated by receivers appointed by this Court, which receivers had notified the said Marion Banister, in August, 1931, that they would advance no more money to the Publishing Company, as had theretofore been done by the Hotel Company, or be a party in any way to the publication of the magazine, but that as set forth in a petition submitted by the said receivers to this Court for leave to sell the capital stock of The Washingtonian Publishing Company, copy of which petition is attached hereto and prayed to be read as a part hereof as defendant's Exhibit I, "subsequently one issue of The Washingtonian was published with the knowledge of said receivers, but without any liability having been assumed by them therefor, and later, one or two other issues were published *without their knowledge or consent*"; that this Court, under date of April 4, 1932, ordered the sale of the stock of the said company, in accordance with the terms set forth in the said petition, and a copy of said order is attached hereto and prayed to be read as a part hereof as defendant's Exhibit II.

11. (a) That defendants Pearson and Allen admit the allegations of Paragraph 11 of the Bill.

(b) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 11 and, therefore, neither admit nor deny the same, but, if material, demand strict proof thereof.

12. (a) That defendants Pearson and Allen admit the allegations of Paragraph 12 of the Bill, except as to the claim of copyright, and state, upon information and belief, that, as apparent from plaintiff's Exhibit II, attached to the Bill of Complaint, no formal claim of copyright was filed until February 21, 1933, at which time copies of the December, 1931, issue were deposited in the copyright office.

(b) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged in Paragraph 12 and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

13. That they have no knowledge of the facts alleged in Paragraph 13 and neither admit nor deny the same but, if material, demand strict proof thereof and state that if the deposit of copies were made as alleged they were not deposited pursuant to the provisions of Section 12 of the Copyright Act, in that the said copies, as shown by Paragraph 13 of the Bill, were deposited more than 14 months after the printing of the notice of the copyright, whereas Section 12 of the Act requires that such copies shall be *promptly* deposited in the copyright office.

14. That they have no knowledge of the facts set forth in Paragraph 14 of the Bill, and therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

15. That they deny the allegations of Paragraph 15 that plaintiff acquired the exclusive rights to the said article, "The Mills—of the Gods", and for further answer thereto state that any rights which might have been available to the plaintiff by compliance with the provisions of the Copyright Act became subject to the intervening rights of defendant Liveright, which became the owner of a copyright upon certain parts of the material, which is alleged to be an infringement, by publication, with notice of copyright in August, 1932, of a book entitled "More Merry-Go-Round"; that two copies of said book, as alleged in the Bill of Complaint, were immediately deposited in the copyright
16 office, together with an application for registration; and that the certificate of registration was duly issued on August 26, as fully appears on the copy thereof which is attached hereto and prayed to be read as a part hereof as defendants' Exhibit III.

16. That they have no knowledge of the facts set forth in Paragraph 16 of the Bill and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof.

17. (a) That defendants Pearson and Allen admit the allegations of Paragraph 17, except as to the infringement complained of, and they deny that the use of certain material appearing in the article "The Mills—of the Gods", and published in the book called "More Merrry-Go-Round" under the title "The Wizards of Reconstruction" constituted an infringement, and they further deny that in so using the said material they pirated, plagiarized, appro-

priated, stole, imitated, copied, recomposed, and arranged the essence and substance of the said article.

(b) That, for further answer, defendant Pearson states that he had a perfect right to the full use of the said article; that by letter and check dated July 22, 1932, he purchased, and paid the said Rixie Smith for, the privilege of such use; that, furthermore, he verily believed that The Washingtonian Publishing Company had abandoned any intention which it may originally have entertained regarding compliance with the Copyright Act in order to obtain protection as to the contents of the December, 1931, issue of The Washingtonian, even as the said Banister had failed to complete registration of copyright as to the issues of August, September, October and November, 1931, as will hereinafter more fully appear; and that defendant Pearson is informed and believes, and therefore avers, that the said Rixie Smith not only received no payment for the said article, but also that he released to The Washingtonian Publishing Company no rights whatsoever to copyright or otherwise appropriate to its exclusive use the said article

17 in whole or in part, and that the said Smith claimed to have retained the rights to the said article; and that the said Marion Banister well knew that the company was without authority to publish the issue of December, 1931, which contained the said article, and was without funds to pay for the article or to pay the fee for securing registration of copyright; and that defendant Pearson knew that the said Marion Banister had not, for several months prior to the final issue in December, 1931, filed application for registration, sent bills to subscribers, or kept the cir ·l-lation list of the magazine up to date.

(c) That defendants Liveright and Van Rees Press deny the allegations of Paragraph 17, except as to the mere fact of publication and sale of the book entitled "More Merry-Go-Round", which fact they admit, and, in further answer, state that they have no knowledge of the publication of the article entitled "The Mills—of the Gods", but were and are informed, and believe, that defendant Liveright has full and exclusive right to the publication and use of all material appearing in the said book, including that under the chapter title "The Wizards of Reconstruction".

18. That they admit the allegation of Paragraph 18 that they cooperated in having printed, published, sold, distributed, and circulated to the public, for profit, the said book "More Merry-Go-Round" throughout the United States, but deny that they falsely and unlawfully represented that the said book was an original work in its entirety, and they further deny that the book unlawfully and illegally imitates, appropriates, plagiarizes, copies and reproduces the complete essence and substance of the article entitled "The Mills—of the Gods".

19. (a) That defendants Pearson and Allen deny the allegation of Paragraph 19 that they purloined and pirated the said article, "The Mills—of the Gods", and engaged the defendants Liveright and Van Rees Press to publish
18 and sell the book "More Merry-Go-Round" in violation of the provisions of the Copyright Act, and in further answer thereto, aver, upon information and belief, that it was not necessary to secure the consent of plaintiff to use the said article or any part thereof, because of the fact that the plaintiff had never secured exclusive right to the use of said article, but on the contrary had never completed the purchase thereof from the said Rixie Smith and had, in fact, never completed registration of the copyright by filing a claim therefor and depositing in the copyright office the required copies of the December, 1931, issue, but had abandoned the publication with the issue of December, 1931, and that the publication and sale of the book "More Merry-Go-Round" were in complete accordance with the Copyright Act and all other laws.

(b) That defendants Liveright and Van Rees Press are informed and believe that it is not necessary for them to answer the allegations of Paragraph 19.

20. That they deny the allegation of Paragraph 20 that the article, "The Mills—of the Gods", is duplicated in the chapter entitled "The Wizards of Reconstruction" in the book "More Merry-Go-Round", but admit that the said chapter contains certain excerpts from the said article.

21. (a) That defendant Pearson denies the allegations of Paragraph 21 that he was associated with plaintiff in the preparation of the December, 1931, issue of The Washingtonian, and. in further answer thereto, states that he was

not associated with the plaintiff in the publication of The Washingtonian for the month of December, 1931, but that he severed his connection with the enterprise after the issue of November, 1931, as more particularly set forth herein in the answer to Paragraph 6 of the Bill; that he denies that the plaintiff secured the protection of the Copyright Act in connection with the said article "The Mills—of the Gods",
and denies that the plaintiff possessed any proprie-
19 tary right in and to the said article, and denies that
he conspired with the other defendants, or anyone, in any way, shape, or form; and, for further answer, states, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been secured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

(b) The defendant Allen admits the allegation of Paragraph 21 that defendant Pearson prepared or assisted in preparing the manuscript of the book "More Merry-Go-Round", but has no knowledge of the facts alleged as to defendant Pearson's association with the plaintiff and, therefore, neither admits nor denies the same but, if material, demands strict proof thereof; that defendant Allen denies the allegation that he engaged in a conspiracy to violate any right of plaintiff to the article "The Mills—of the Gods", and, for further answer, states, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been secured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

(c) That defendants Liveright and Van Rees Press have no knowledge of the facts alleged as to the actual preparation of the manuscript of the book "More Merry-Go-Round", and as to defendant Pearson's association with plaintiff and, therefore, neither admit nor deny the same but, if material, demand strict proof thereof; that they deny the allegation that they engaged in a conspiracy to violate any right of plaintiff to the article "The Mills—of the Gods", and, for further answer, state, upon information and belief, that the intervening rights of defendant Liveright, Inc., are paramount to any alleged to have been se-

cured by plaintiff by completion of registration more than 14 months after publication of notice of copyright.

22. (a) That, in further answer to the Bill of
20 Complaint, the defendants, upon information and belief, aver that it is the practice of the copyright office to rely upon persons desiring the protection of the Copyright Act voluntarily to take the formal steps prescribed by the Act, including the prompt deposit of copies after publication of notice of copyright, and the filing of the application for registration, which application is often called the claim of copyright; that the copyright office has no means of ascertaining the publications that carry notice of copyright, and is, therefore, not in a position to know of whom to make demand for the deposit of copies and the completion of the registration process; that the Register of Copyrights believes that there are many cases where publications carry notice of copyright but the owners, because of imminent or actual abandonment of the publication or for other reasons, never complete registration, and that the great majority of such cases never come to the attention of the Register; and that the Register has no authority to determine or consider the rights of adverse copyright claimants.

(b) That, upon information and belief, the defendants also aver that the plaintiff duly completed registration of copyright for the issues of January, 1928, through July, 1931, with the exception of February, 1928, which latter issue was never registered, although notice of copyright was published therein; and that the issues of August, September, October, November and December, 1931, being the last five issues of The Washingtonian, carried a notice of copyright, but no application or deposit of copies was made until February 21, 1933.

(c) That, upon information and belief, the defendants aver that Section 13 of the Copyright Act authorizes the Register of Copyrights to make a demand upon persons for the deposit of copies of a publication which carries a notice
of copyright, and further authorizes the imposition
21 of a penalty for failure to comply with such a demand, but that the Register of Copyrights has not, throughout the years, made a demand for the deposit of copies under Section 13 in more than a score of cases; and

that the penalty for failure to comply with such a demand has, so far as can be ascertained, been imposed in only one case.

(d) That, upon information and belief, the defendants aver that the said Marion Banister communicated with the said Rixie Smith during the latter part of August or the first part of September, 1932, and asked that he join in the filing of a bill of complaint similar to that herein, but that the said Smith refused to be a party to such a proceeding.

The defendants, having fully answered the Bill of Complaint, ask that the Bill be dismissed and that they be allowed to go hence with their costs, including reasonable attorneys' fees.

DREW PEARSON
ROBT. S. ALLEN

LIVERIGHT, INC.

By ARTHUR PELL
Treas

VAN REES PRESS, INC.

By ABRAHAM C. VAN REES,
Trea.

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants,

Receipt of a copy of the foregoing Answer acknowledged this 24th day of April, 1933.

GIBBS L. BAKER
ALAN B. DAVID
Attorneys for Plaintiff

22 No. 29011 Series D

STATE OF NEW YORK,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, having a seal, DO HEREBY CERTIFY, That Sadye Katz whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the

time of taking such deposition, or proof and acknowledgment, a Notary Public in and for such County, duly commissioned and sworn, and authorized by the laws of said State, to take depositions and to administer oaths to be used in any Court of said State and for general purposes; and also to take acknowledgments and proofs of deeds, of conveyances for land, tenements or hereditaments in said State of New York. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition or certificate of proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court and County, the 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

STATE OF NEW YORK
County of New York, ss:

I, Drew Pearson, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

DREW PEARSON

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

SADYE KATZ
Notary Public.

(Notarial Seal)

CITY OF WASHINGTON
District of Columbia, ss:

I, Robert S. Allen, being first duly sworn, on oath depose and say that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

ROBERT S. ALLEN

Subscribed and Sworn to before me, a Notary Public in and for the District of Columbia aforesaid, this 24th day of April, 1933.

ALFRED BENNETT
Notary Public.

(Notarial Seal)

STATE OF NEW YORK
County of New York, ss:

I, Arthur Pell, being first duly sworn, on oath depose and say that I am the Treasurer of Liveright, Inc., and that I am duly authorized to execute the foregoing answer on its behalf and to verify the same; that I have read the foregoing answer by me subscribed on behalf of Liveright, Inc., and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

23

ARTHUR PELL
Treas

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

RUTH PELL
Notary Public.

(Notarial Seal)

No. 80419 Series D

STATE OF NEW YORK,
County of New York, ss.:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county, DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Ruth Pell whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Bronx with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer

oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

STATE OF NEW YORK
County of New York, ss:

I, Abraham C. Van Rees, being first duly sworn, on oath depose and say that I am the Treasurer of Van Rees Press, Inc., and that I am duly authorized to execute the foregoing answer on its behalf and to verify the same; that I have read the foregoing answer by me subscribed on behalf of Van Rees Press, Inc., and know the contents thereof; that the facts stated therein are true, except those stated upon information and belief, and those facts I verily believe to be true.

ABRAHAM C. VAN REES

Subscribed and Sworn to before me, a Notary Public in and for the State and County aforesaid, this 21st day of April, 1933.

THOMAS C. LARKIN
Notary Public.

(Notarial Seal)

No. 80418 Series D

STATE OF NEW YORK,
County of New York, ss:

I, Daniel E. Finn, Clerk of the County of New York, and also Clerk of the Supreme Court in and for said county,

DO HEREBY CERTIFY, That said Court is a Court of Record, having by law a seal; that Thomas C Larkin whose name is subscribed to the annexed certificate or proof of acknowledgment of the annexed instrument was at the time of taking the same a Notary Public acting in and for said

county, duly commissioned and sworn, and qualified to act as such; that he has filed in the Clerk's Office of the County of New York a certified copy of his appointment and qualification as Notary Public for the County of Westchester with his autograph signature; that as such Notary Public, he was duly authorized by the laws of the State of New York to protest notes; to take and certify depositions; to administer oaths and affirmations; to take affidavits and certify the acknowledgment and proof of deeds and other written instruments for lands, tenements and hereditaments, to be read in evidence or recorded in this state; and further, that I am well acquainted with the handwriting of such Notary Public and verily believe that his signature to such proof or acknowledgment is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of New York, in the County of New York, this 21 day of April 1933

DANIEL E FINN
Clerk.

(Seal)

24 *Memorandum*

Filed July 11, 1933

* * * * * * * * * *

The motion to strike will be granted as to paragraphs 6-B, 7-A and all of 9 and 22 of the Answer, and otherwise overruled.

Upon the main question, argued before me, I am of the opinion that prompt deposit of copies at the Library is not necessary to complete the copyright. However, the answer contains allegations seeking to raise questions as to whether there was abandonment or dedication to public use. These were not referred to in the argument. I am uncertain whether the questions are properly raised by the answer. Therefore, I think it better that the allegations be allowed to stand for disposition at the time of trial. The long delay in filing copies would seem to be evidence bearing on that question.

July 10, 1933.

JAMES M. PROCTOR
Justice.

25 *Memorandum*

Filed March 28, 1935

* * * * * * * * *

At the conclusion of the trial I announced that I was satisfied from the evidence that the plaintiff company acquired copyright upon publication of the article with notice of copyright in "The Washingtonian" in its issue of December 10, 1931. Upon announcing such conclusion I reserved for further consideration the question of plaintiff's right to the remedy sought.

The facts which are material to a consideration of the question are stated in chronological form, as follows:

On December 10, 1931 the plaintiff published the last issue of its monthly magazine, The Washingtonian, claiming copyright thereon by means of the usual printed notice. (The claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office.) On August 25, 1932 Liveright, Inc., one of the defendants, published a book entitled "More Merry-Go-Round", written by defendants Pearson and Allen and printed by defendants Van Rees Press, Inc. This book contained matter substantially similar to the contents of an article appearing in the said December, 1931, issue of The Washingtonian. Copyright was claimed by means of the usual printed notice; On August 26, 1932 defendant Liveright deposited two copies of the said book, "More Merry-Go-Round", together with claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration; on December 14, 1932 the last edition of "More Merry-Go-Round" was printed; on February 21, 1933, plaintiff deposited copies of the said December, 1931, issue of The Washingtonian, together with claim of copyright, in the Copyright Office, paid the fee, and secured a certificate of registration; (on the same day it likewise deposited copies, and obtained registration of claim of copyright, of the other eleven issues, January through November, of 1931); on March 8, 1933 plaintiff instituted this suit alleging infringement of the article appearing in its said issue of December, 1931.

It thus appears that the plaintiff failed to register
26 its claim of copyright and to deposit copies of the

work in question until more than 14 months after publication, approximately six months after the occurrence of the alleged infringing act, and more than two months after the printing of the last edition of the alleged infringing work.

So far as it is pertinent to this discussion, Section 12 of the Copyright Act of 1909, as amended, provides—

"That after copyright has been secured by publication of the work with the notice of copyright as provided in Section nine of this Act, there shall be promptly deposited in the Copyright Office or in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . to be acompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

In approaching the question it is necessary to have in mind that at common law an author had the exclusive privilege of first publishing his work or the right to prevent it from being published by others unless he should have first published it himself. He had a right to determine whether or not it should be published at all, and if published, when, where by whom and in what form. But this exclusive right was confined to the first publication. When once published, his work was dedicated to the public, and he had no exclusive right to multiply copies of it or to control the subsequent issues of copies by others. This common law right is known as "common law copyright", or "copyright before publication". It is the right which an author has in his manuscript and is a property right. It is so stated by Samuel D. Hirschl in his special lecture "Trademark and Copyright Protection in Business".

The rights and remedies of the copyright proprietor, here considered, are created by statute. By the statute certain rights are secured and certain remedies afforded to the copyright proprietor. The rights being created by statute are determined and measured by the provisions of the statute only; but the statute has a double aspect; it not only secures rights to the copyright proprietor but affords him certain remedies as well; and the remedies are only such as are prescribed by the statute.

Clearly the copyright is secured to an author upon the publication of the copyright work with notice of his claim of copyright, but the statute requires more of him before he can avail himself of the remedies given by the statute. Since the remedies are statutory only he is entitled to them only when he has met the requirements of the statute. By complying with the conditions of the statute the copyright proprietor is entitled to recover statutory damages upon proof of such facts only as are made necessary by the language of the statute. In securing his copyright by publication an author has fixed in law his property rights
27 in the copyright work, but he has not put himself in position to ask or enforce the payment of statutory damages by one who infringes the copyright work. If he wishes to avail himself of the remedies afforded by the statute he must go further and do that which is required by the statute, i. e., he shall promptly deposit in Copyright Office two copies of the copyright work; until he does so he has a naked property right in the copyright work. When he has complied with the statute by promptly depositing the copies in the Copyright Office he has put himself in position to secure the protection of the courts and to recover statutory damages if his copyright work be infringed. The statute confers the property rights in the copyright work upon publication with notice, but the enjoyment and protection of such rights through the remedial processes afforded by the statute are subject to the accomplishment of the conditions and formalities prescribed in the statute. It would seem that the jurisdiction of this court to enforce plaintiff's rights is conferred solely by plaintiff's full compliance with such conditions and formalities.

Sutherland in his work on STATUTORY CONSTRUCTION, Second Edition, Volume II at page 1140 is authority for the proposition that in statutory proceedings the statute must be substantially complied with; every act required which is jurisdictional or of the essence of the proceeding, or prescribed for the benefit of the party to be affected thereby, must be done; the requirement is mandatory. At page 1142 he makes the further observation that where a statute confers a new right, privilege or immunity the grant is strictly construed, and the mode prescribed for its acquisition, preservation, enforcement and enjoyment is man-

datory. On the same page he says that this is the rule as to copyrights.

The principles of statutory construction as here applied resemble those which control the construction of enabling statutes. Such statutes impliedly prohibit any other than the statutory mode of doing the acts which they authorize. This is illustrated by numerous cases where statutory rights and remedies are given. It is said that where a statute, in granting a new power, prescribes how it shall be exercised, it can lawfully be exercised in no other way; and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed; the mode of proceeding prescribed must be strictly pursued; the provisions regulating the procedure are mandatory as to the essence of the thing required to be done.

I conclude as matter of law that as a condition precedent to plaintiff's right to avail itself of the remedies afforded by the copyright law it was necessary for it to promptly deposit two copies of its publication in the Copyright Office. This it failed to do and only attempted to comply with the statute in that regard some months after the occurrence of the alleged act of infringement. The plaintiff has not therefore made out a case which will entitle it to the statutory remedy which it seeks. For the reasons assigned plaintiff's bill of complaint will be dismissed; the costs to be assessed against the plaintiff. Section 40 of the Copyright Act permits the award of attorneys' fees as part of the costs within the discretion of the Court; but the Court is not persuaded that attorneys' fees should be so assessed in this case.

Formal orders, necessary for the record, will be presented.

F. DICKINSON LETTS
Justice

28 *Memorandum*

Filed February 10, 1936

* * * * * * * * * *

Since writing the memorandum filed March 28, 1935 plaintiff's motion for re-hearing has been filed and submitted. Upon consideration of such motion my attention has been directed to the case of Lumiere vs Pathe Exchange, Inc.,

et al, 275 Fed. 428, and certain English cases notably Goubaud & Another vs. Wallace decided by the High Court of Judicature in May, 1877.

An examination of these authorities and others furnished by plaintiff in support of the motion for rehearing persuaded me that the conclusion expressed in my memorandum of March 28, 1935 is erroneous.

It follows that the motion for re-hearing should be granted. An appropriate order may be presented granting such motion.

F. DICKINSON LETTS
Justice

29 *Findings of Fact and Conclusions of Law*

Filed December 14, 1936

• • • • • • • • • •

The Court makes and finds the following facts and conclusions of law:

Findings of Fact

1. The plaintiff is a corporation created and existing under the laws of the State of Delaware with an office and place of business at Washington, D. C.

2. The defendants, Drew Pearson and Robert S. Allen, are residents of the District of Columbia; and the defendants Liveright, Inc., and Van Rees Press Inc., are corporations organized under the laws of the State of New York with principal offices in the city of New York.

3. In December, 1931, and for some time prior thereto, the plaintiff was the owner and publisher at Washington, D. C., of a monthly magazine of general circulation called THE WASHINGTONIAN.

4. On December 10, 1931, the plaintiff published an issue of THE WASHINGTONIAN claiming copyright upon the contents thereof by means of the usual printed notice. However, the claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office. The said December issue contained, among other material, a featured article entitled "The Mills—of
30 the Gods" written by one Rixie Smith under the pen name of Linthicum Hall.

5. The plaintiff has published no issue of THE WASHINGTONIAN since the said issue of December 10th, 1931.

6. On August 25, 1932, Liveright, Inc., one of the defendants, published and offered for general sale a book entitled "More Merry-Go-Round" written by defendants Pearson and Allen and printed by defendants Van Rees Press, Inc. This book included a chapter entitled "The Wizards of Reconstruction" which contained matter practically identical with the said article by Rixie Smith appearing in the said December, 1931, issue of THE WASHINGTONIAN.

7. Copyright of the book "More Merry-Go-Round" was claimed by means of the usual printed notice, and, on August 26, 1932, defendant Liveright deposited two copies of the said book, together with the claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration. On December 14, 1932, the last edition of "More Merry-Go-Round" was printed.

8. On February 21, 1933, plaintiff deposited copies of the said December, 1931, issue of THE WASHINGTONIAN together with claim of copyright, in the copyright Office, paid the fee, and secured a certificate of registration. On the same day plaintiff likewise deposited copies and obtained registrations of claim of copyright of the other eleven issues—January through November—of 1931.

9. On March 8, 1933, plaintiff instituted this suit alleging infringement of the article appearing in the said December, 1931, issue of THE WASHINGTONIAN.

31 *Conclusions of Law*

1. Upon the publication of the December, 1931, issue of THE WASHINGTONIAN, with the notice of copyright, the plaintiff acquired a valid copyright of the magazine and of all of the material contained therein, including the article entitled "The Mills—of the Gods", and the plaintiff has not lost or disposed of its right.

2. The failure of the plaintiff promptly to deposit two copies of the said December, 1931, issue of THE WASHINGTONIAN after publication, and to secure registration of the copyright thereof, did not deprive it of the right to maintain an action for infringement of the material contained therein, even though such infringement occurred prior to the deposit of copies.

3. The deposit by plaintiff of copies of its December, 1931, issue of THE WASHINGTONIAN on February 21, 1933, and thereupon obtaining registration certificate thereof, entitled plaintiff to maintain an action for infringement occurring before the deposit of copies and registration of the work.

4. The plaintiff's copyright of the December, 1931, issue of THE WASHINGTONIAN was wrongly infringed by the defendants by the publication and sale of the book entitled "More Merry-Go-Round", and plaintiff is entitled to damages against the defendants for such infringement and to a perpetual injunction against further infringement.

December 14th 1936

F. DICKINSON LETTS
Justice.

32 *Decree*

Filed December 14, 1936

* * * * * * * * *

This cause coming on to be heard at this term upon the pleadings and testimony, and being considered by the Court, it is, by the Court, this 14th day of December, 1936,

ADJUDGED, ORDERED and DECREED,

1. That the plaintiff is the owner of the copyright of the December, 1931, issue of the monthly magazine known as "The Washingtonian", and said copyright has been wrongfully infringed by the defendants by the publication and sale of the book entitled "More Merry-Go-Round" and the plaintiff is entitled to recover damages from the defendants, jointly and severally, for such infringement.

2. That the defendants, their agents, servants and employees be, and they are hereby, perpetually enjoined from infringing plaintiff's said copyright and from hereafter publishing or selling or otherwise distributing any part of the copyrighted article entitled "The Mills—of the Gods", contained in said December, 1931, issue of "The Washingtonian";

3. That this cause be, and hereby is, referred to the Auditor of this Court who shall take, state and report as follows:

(a) What damages have been suffered by the
33 plaintiff due to the infringement of the plaintiff's copyright as hereinbefore set out, as well as all the profits which the defendants, or any one of them, shall have made from such infringement, and in proving such profits, the plaintiff shall be required to prove sales only and the defendants shall be required to prove every element of cost which they claim;

(b) The number of copies of the infringed book entitled "More Merry-Go-Round" made or sold by or found in the possession of the defendants or their agents or employees.

F. DICKINSON LETTS
Justice.

From the foregoing decree the defendants, by their attorney, in open court, note an appeal to the U. S. Court of Appeals for the District of Columbia. A bond to cover costs is hereby fixed in the sum of One Hundred Dollars ($100) with leave to deposit with the clerk the sum of Fifty Dollars ($50) in lieu thereof. Upon the perfection of an appeal and the filing of a supersedeas bond in the sum of Five Thousand Dollars ($5,000) the reference to the Auditor as provided in the decree shall be stayed pending the final determination of the case upon review.

F. DICKINSON LETTS
Justice.

Memorandum

DECEMBER 23, 1936

$50 deposited on appeal by E. C. Lovett.

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34 *Assignment of Errors*

Filed January 5, 1937

* * * * * * * * *

The Court erred:

1. In concluding that the plaintiff has not lost its copyright to the article in question.

2. In concluding that the failure of the plaintiff promptly to deposit two copies of the December, 1931, issue of THE

WASHINGTONIAN after publication, and to secure registration of the copyright thereof, did not deprive it of the right to maintain an action for infringement of the material contained therein, even though such infringement occurred prior to the deposit of copies.

3. In concluding that plaintiff's deposit on February 21, 1933, of copies of the December, 1931, issue of THE WASHINGTONIAN, and thereupon obtaining registration certificate thereof entitled plaintiff to maintain an action for infringement occurring before the deposit of copies and registration of the work.

4. In concluding that the plaintiff is entitled to damages against the defendants.

5. In not dismissing the bill of complaint.

6. In other respects shown by the record.

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants.

Receipt of a copy of the foregoing Assignment of Errors acknowledged this 31st day of December, 1936.

GIBBS L. BAKER
ASHBY WILLIAMS
Attorneys for Plaintiff.

35 *Joint Designation of Record*

Filed January 9, 1937

* * * * * * * * *

It is hereby stipulated and agreed by the attorneys for the respective parties that the transcript of record which the Clerk of the Court is hereby requested to prepare in the above entitled cause for submission to the Court of Appeals shall consist of the following:

1. Bill of Complaint, but omitting the Exhibits attached thereto.

2. Joint and several answer of the defendants to bill of complaint, but omitting the Exhibits attached thereto.

3. Memorandum opinion (July 10, 1933) of Mr. Justice Proctor that plaintiff's motion to strike certain paragraphs of the answer should be granted.

4. Memorandum opinion (March 28, 1935) of Mr. Justice Letts that the bill of complaint should be dismissed, with

costs against the plaintiff, but with no assessment of attorneys' fees.

5. Memorandum opinion (February 10, 1936) of Mr. Justice Letts that his previous opinion was erroneous and that plaintiff's motion for a rehearing should be granted.
6. Decree in favor of plaintiff.
7. Findings of Fact and Conclusions of Law.
8. Assignment of Errors.
9. This designation.

GIBBS L. BAKER
ASHBY WILLIAMS
Attorneys for Plaintiff

ELISHA HANSON
ELIOT C. LOVETT
Attorneys for Defendants.

36 District Court of the United States for the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 35, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 55429 in Equity, wherein The Washingtonian Publishing Co. Inc., is Plaintiff and Drew Pearson, Robert S. Allen, Liveright, Inc., and Van Rees Press, Inc., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 24th day of February, 1937.

C. E. STEWART,
Clerk.

(Seal)

Endorsed on Cover: No. 6921. Drew Pearson et al., Appellants, vs. The Washington Publishing Co., Inc. United States Court of Appeals for the District of Columbia Filed Mar 6—1937 Moncure Burke, Clerk

[fol. 33] Monday, December 13th, A. D. 1937.

No. 6921

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., et al., Appellants,

vs.

THE WASHINGTONIAN PUBLISHING CO., INC.

The argument in the above entitled cause was commenced by Mr. Eliot C. Lovett, attorney for appellants, and was continued by Mr. Horace S. Whitman, attorney for appellee, and was concluded by Mr. Eliot C. Lovett, attorney for appellants.

[fol. 34] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6921

DREW PEARSON, ROBERT S. ALLEN, LIVERIGHT, INC., et al., Appellants,

v.

THE WASHINGTONIAN PUBLISHING CO., INC.

Appeal from the District Court of the United States for the District of Columbia

Decided April 25, 1938

Elisha Hanson and Eliot C. Lovett, both of Washington, D. C., for appellants.

Gibbs L. Baker and Horace S. Whitman, both of Washington, D. C., for appellee.

Before Groner, Stephens and Miller, J.J.

MILLER, J.:

This is an appeal from a decree of the District Court of the United States for the District of Columbia holding that a copyright owned by appellee was wrongfully infringed

by appellants and that appellee is entitled to damages for such infringement.

The Washingtonian Publishing Co., Inc., appellee, in December, 1931, published an issue of a monthly magazine of general circulation, called The Washingtonian, claiming copyright thereof by means of the usual notice printed therein as required by the Copyright Act of the United States then in force.[1] However, copies of that issue of the magazine were not deposited in the Copyright Office until February 21, 1933—at which time two copies were deposited and a certificate of registration was obtained. Publication of the magazine The Washingtonian was discontinued after the December 1931 issue.

In August, 1932, appellant Liveright, Inc., published and offered for general sale a book entitled "More Merry-Go-Round" written by appellants Fearson and Allen and printed by appellant Van Rees Press, Inc., one chapter of which included material which is conceded to be practically identical with an article which was included in the December 1931 issue of The Washingtonian. Copyright of the book "More Merry-Go-Round" was claimed by the usual printed notice therein, and on August 26, 1932, copies thereof were deposited in the Copyright Office and a certificate [fol. 35] of registration secured. In June, 1933, Liveright, Inc., was adjudged a bankrupt and is not concerned in this appeal.

Chronologically summarized, this means that appellee published and claimed a copyright in December, 1931; appellants published, deposited copies and claimed copyright on the same material eight months later, in August, 1932; appellee deposited copies in February, 1933, fourteen months after its own publication and six months after appellants' publication.

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[1] Section 9, Copyright Act of 1909, 35 Stat. 1077, 17 U. S. C. A. § 9. "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 21 of this title."

Appellee regards appellants' publication as an infringement. Appellants concede that appellee obtained a copyright,[2] but insist that its right to recover in the present case is barred because it failed, promptly, to deposit copies of its magazine as required by Section 12 of the Copyright Act, 35 Stat. 1078, as amended (17 U. S. C. A. § 12);[3] and because in the meantime appellants had acquired superior intervening rights in the literary matter in dispute.

Appellee, in its brief, says:

> The charge here is that the appellants pirated, plagiarized, and stole the property of the appellee and the claim of intervening rights is equivalent to a confessed thief seeking to establish a right of property in the stolen goods.

On the other hand, appellants say in their brief:

> Under such a construction a publisher of a daily newspaper could include a copyright notice in each issue of his paper but decide that, instead of depositing copies and paying the two-dollar registration fee, all of which would exceed $700 per year, he would merely wait and see if any financially responsible party pirated

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[2] See National Cloak & Suit Co. v. Kaufman, C. C. M. D. Pa., 189 F. 215; New York Times Co. v. Star Co., C. C. S. D. N. Y., 195 F. 110; Davenport Quigley Expedition v. Century Productions, S. D. N. Y., 18 F. Supp. 974; Lumiere v. Pathé Exchange, 2 Cir., 275 F. 428.

[3] Section 12, so far as material, reads as follows: "After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be *promptly deposited* in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published * * * to be accompanied in each case by a claim of copyright. *No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.*" [Italics supplied.]

> [sic] material contained in any one of the issues and, if so, he would proceed to deposit copies of the issue in question, register his claim, and then institute proceedings, * * * Surely, no court would countenance a proceeding under such circumstances. * * *

And appellee concedes in its brief that no effort was made to deposit copies, as required by the Act, until after counsel were employed to bring suit, thus giving color at least to appellants' innuendo that appellee deliberately waited to see if a financially responsible party would fall into the trap.

We do not wish to be understood, from anything we may say herein, as approving or condoning such practices. [fol. 36] Whatever the ethics of the situation may be, and in spite of considerations which may call for professional and public condemnation, the questions which have been presented for our determination in the present case are solely ones of law.

Copyright property under the Federal law is wholly statutory. Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 346. It is not unusual for statutes to require strict compliance with designated provisions as conditions precedent to the bringing of actions for the enforcement of rights.[4] In this

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[4] Thus, it has been held that: No action may be maintained under the Workman's Compensation statutes unless a claim has been timely filed. Rogulj v. Alaska Gastineau Mining Co., 9 Cir., 288 F. 549; Bussey v. Bishop, 169 Ga. 251, 150 S. E. 78. See Fulton v. Hoage, 77 F. (2d) 110, 64 App. D. C. 232.

A holder of a note may not seek recovery from an indorser without first making a timely presentment and notification of dishonor. Roberts v. International Bank, 25 F. (2d) 214, 58 App. D. C. 87. See Magruder v. Union Bank of Georgetown, 3 Pet. [U. S.] 87.

Residence for the statutory period is a prerequisite to an action for divorce. Winston v. Winston, 271 F. 551, 50 App. D. C. 321; Rollings v. Rollings, 53 F. (2d) 917, 60 App. D. C. 305.

A condition precedent to a shareholder's representative suit under Federal Equity Rule 27 is appeal to the officers

case the Statute provides (Section 12) that no action shall be maintained for infringement until the provisions of this title with respect to the deposit of copies shall have been complied with. It is argued that this merely postpones "the enforcement of the remedy" and that no matter how long may be the delay in compliance, so soon as compliance takes place the remedy becomes available. The penalty prescribed by Section 13 of the Act, 35 Stat. 1078 (17 U. S. C. A. § 13)[5] is referred to by appellee as indicating the only purpose of the requirement for prompt deposit of copies. Some support for this argument can be found by giving to the word until [6] one of its common meanings; by reading it with-

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of the corporation or its stockholders. Watts v. Vanderbilt, 2 Cir., 45 F. (2d) 968.

One of the essentials of the cause of action on an insurance policy is the filing with the insurer of proofs of loss. Harris v. North British & Mercantile Ins. Co., 5 Cir., 30 F. (2d) 94, cert. denied, 279 U. S. 852; Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398. The acquisition of title by adverse user is an example of intervening rights and dispossession of an owner whose only fault is his failure timely to assert his rights. 2 Tiffany, Real Property (2d ed. 1920) 1920.

[5] "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

[6] "* * * up to the time of, implying cessation or reversal at that time; * * *" Webster. "The word 'until' is a word of limitation, and presupposes that, when the condition following such word shall become operative, the pre-

out careful consideration of the rest of the language of Section 12; and by disregarding the major purposes of the Act. But when the word until is considered in its context, not only [fol. 37] in the Section but in the light of the whole Act, as it should be, an entirely different result is reached, and a different meaning is properly ascribed to it.[7]

It must be conceded that appellee could not maintain an action for infringement at the time of publication of "More Merry-Go-Round" or for six months thereafter. Fourteen months having elapsed since publication and claim of copyright, and six months having elapsed since the alleged infringement, appellee undertakes to comply with the Statute and thus to remove the restriction which impedes action. What must it do? Section 12 provides that it must promptly deposit two copies. It does not say merely to deposit, but that the deposit must be promptly made; and promptness must be measured from the date of publication. Unless it can be said, therefore, that a delay of fourteen months is promptness, appellee has failed to comply with the Act.

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cedent condition or status shall fall." Bud Hoard Co. v. F. Berg & Co., 137 Okla. 16, 17, 278 P. 273, 274. "Its office is to point out some point of time or the happening of some event when what precedes it shall cease to exist or have any further force or effect." Maginn v. Lancaster, 100 Mo. App. 116, 130, 73 S. W. 368, 372.

[7] It has been held that where an insurance policy failed to provide a definite time within which to file a proof of loss, such proof must be filed within a reasonable time in order to come within the provision that no action could be maintained until all conditions had been performed. Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 S. E. 821, 822. Cf. Barbour v. St. Paul Fire & Marine Ins. Co., 101 Wash. 46, 171 P. 1030.

In Chelmsford Co. v. Demarest, 7 Gray [Mass.] 1, a case involving an action on a suretyship bond of a public official, which bond was for a term "until the appointment and qualification of his successor," it was held that the surety was not bound for an indefinite period after the incumbent's term expired, but only for a reasonable time. See, also, Camden v. Greenwald, 65 N. J. L. 458, 47 A. 458, and American Surety Co. v. Independent School Dist. No. 18, 8 Cir., 53 F. (2d) 178, cert. denied, 284 U. S. 683.

It is not contended that the deposit was made promptly in the present case; and there is no basis upon which such a contention could be made. Synonyms for the word prompt, as commonly used, are punctual, ready, expeditious and quick. Its antonyms are dilatory, procrastinating, slow and sluggish. To ascribe to the word a meaning which would describe appellee's action as prompt would be to give it a meaning exactly its opposite.[8]

The copyright laws must be given a reasonable construction and the various sections thereof must be read together with a view to effecting the purposes intended by Congress. Bobbs-Merrill Co. v. Straus, supra; Metro-Goldwyn-Mayer Distributing Corp. v. Bijou, 1 Cir., 59 F. (2d) 70, 76. The two major purposes of the Act are (1) to secure to the author, or his successors in interest, a monopoly,[9] more or less in the nature of a reward for his genius and industry (Harris v. Coca-Cola Co., 5 Cir., 73 F. (2d) 370, cert. denied, 294 U. S. 709), as well as for the encouragement of others, simi- [fol. 38] larly as in the case of patents;[10] (2) to give notice

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[8] See, also, Bacigalupi v. Phoenix Bldg. & Const. Co., 14 Cal. App. 632, 641, 112 P. 892, 895, reasonable time; Houston & T. C. Ry. v. Foster, [Tex.] 86 S. W. 44, ordinary diligence; Burlingame v. Adams Express Co., D. C. R. I., 171 F. 902, 904, without unreasonable delay; Western Union Tel. Co. v. Barbour, 206 Ala. 129, 89 So. 299, 17 A. L. R. 103, as quickly as practicable under the circumstances. See, also, Weil, American Copyright Law (1917) 313.

[9] Globe Newspaper Co. v. Walker, 210 U. S. 356, 367; Stern v. Rosey, 17 App. D. C. 562, 564.

[10] Bauer & Cie v. O'Donnell, 229 U. S. 1, 10; Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U. S. 502, 511; H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 7: "Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors."

to the public that the author or other owner has not abandoned the child of his intellect, or dedicated it to public use.[11] We said in Koppel v. Downing, 11 App. D. C. 93, 104:

The law of copyright, while securing a long continued monopoly, contemplates, and the policy of it requires that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public.

Prompt deposit and registration aid in achieving both purposes. The reason therefor is well stated in Weil, American Copyright Law (1917) 310, as follows:

The object sought by compelling registration is that third persons, by inquiry, may ascertain whether, or, not, any proposed acts or works would violate any existing statutory copyright. The primary object of requiring the deposit of copies is that the subject matter of works in which copyright is claimed, may be made public and available, for purposes both of information and of avoiding infringement. The purely secondary object is the enrichment of the Library of Congress. The primary purpose would be entirely defeated unless the deposit were made "promptly." If the only necessary effect of failure to make the deposit, "promptly," were to prevent the institution of suit, until the deposit was made, the statute would become, as the former English one was justly called, a mere snare for the unwary, who were foolish enough to rely upon absence of registration as showing absence of copyright. [And see succeeding pages.]

An examination of the history of the copyright law brings us to the same conclusion. In its earlier forms the law required deposits to be made within definite periods of time—(1) deposit of title of the copyrighted material before publication and of a copy of the material itself within six months after publication (Act of 1790, 1 Stat. 125); (2) deposit of title before publication and of a copy within three months after publication (Act of 1831, 4 Stat. 437; and Act of 1846, 9 Stat. 106); (3) deposit of a printed copy within one month after publication (Act of 1865, 13 Stat. 540); (4) deposit

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[11] Caliga v. Inter Ocean Newspaper Co., 215 U. S. 182, 188 et seq.; Wheaton v. Peters, 8 Pet. [U. S.] 591, 661.

of title before publication, and of copies within ten days after publication (Act of 1870, 16 Stat. 213); and (5) deposit of title "on or before the day of publication" and deposit of copies "not later than the day of the publication * * * ." Act of 1891, 26 Stat. 1107. The Act of 1909, 35 Stat. 1077 (17 U. S. C. A. §9) substituted the requirement of prompt deposit for a specific time limit. It gave a copyright to anyone who published with claim of copy-
[fol. 39] right; but it split up the congeries of rights, powers, privileges and immunities which constituted the original concept of copyright and gave to the word a new meaning, limited at least to the extent that no action for its protection could be maintained until after compliance with the requirement of prompt deposit.

The reasons for promptness of deposit are present today in even greater measure than in earlier years. The liberalizing of the requirement should not be so construed as to defeat its purpose. Appellee's failure to comply with the Act in the present case, coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent.[12]

We are led to the same conclusion, also, by the time limits fixed by Section 13 of the Act, relating to forfeiture of copyrights, and by the language of the House Committee Report on the bill which became the Act of 1909.[13] Section 13 provides for forfeiture—as contrasted with mere loss of right to maintain action—in case of failure to deposit within three months after notice from the Register of Copyrights, or within six months in the case of a copyright proprietor in an outlying territorial possession of the United States.

Lumiere v. Pathé Exchange, 2 Cir., 275 F. 428, relied on by appellee, did not decide the question of the present case. The court in that case expressly avoided consideration of "Other important and difficult questions depending upon the construction of the Copyright Act * * *." And in his concurring opinion, Hough, J., said:

I agree with the foregoing opinion *as far as it goes.* There are, however, two points for which this decision will

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[12] See Weil, American Copyright Law (1917) 313.

[13] H. R. Rep. No. 2222, supra note 10, and language there quoted. See, also, p. 11 of the Report.

by inference be thought authority and as to which I do not wish to be concluded. They are: (1) * * * and (2) whether in any form of action plaintiff can recover damages for infringements committed *before he* not only registered his claim of copyright, but *deposited the requisite number of copies.* [Italics supplied.]

Judge Hough's second reserved point is the one with which we are concerned.

In our opinion the purpose of the law was clearly not to give retroactive effect to a grossly tardy compliance and thus to establish ab initio appellee's right to maintain an action against one who in the interim had acted adversely to its interest.[14] Cf. Wheaton v. Peters, 8 Pet. [U. S.] [fol. 40] 591, 664; Ebeling & Reuss v. Raff, E. D. Pa., 28 U. S. P. Q. 366. See, also, Sutherland, Statutory Construction (2d ed. 1904) § 632. It is not necessary for us to decide what the rights may be, of one who makes such a tardy compliance, as against another who pirates the copyrighted material after the deposit of copies.

Reversed.

Stephens, J., concurs in the result.

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[14] The situation in the instant case is somewhat similar to that of a reissue of a patent. R. S. 4916 (35 U. S. C. A. § 64) provides that whenever a patent is wholly or partially inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention more than he had a right to claim as new, if the error arose by inadvertence, accident, or mistake, and without fraudulent intent, the issued patent may be surrendered and a new patent for the same invention, in correct form, be reissued to the patentee. Under such circumstances, the courts have held that a person who, between the date of the original issue and the date of an application for a reissue, makes or sells an article or uses a process which is broader than the original grant but is included in the application for reissue, acquires an intervening right a against the patentee. Ashland Fire Brick Co. v. General Refractories Co., 6 Cir., 27 F. (2d) 744, 746, cert. dismissed, 278 U. S. 662; Krauth v. Autographic Register Co., D. C. N. J., 285 F. 199, rev'd on other grounds, 3 Cir., 286 F. 470; Supreme Mfg. Corp. v. Security Mfg. Co., 9 Cir., 299 F. 65, cert. denied, 266 U. S. 614.

[fol. 41] Monday, April 25th, A. D. 1938.

April Term, 1938

No. 6921

Drew Pearson, Robert S. Allen, Liveright, Inc., et al., Appellants,

vs.

The Washingtonian Publishing Co., Inc.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, reversed with costs, and that this cause be and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice Miller.

April 25, 1938.

Mr. Justice Stephens concurs in the result.

[fol. 42] In the United States Court of Appeals for the District of Columbia

No. 6921

Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., Appellants,

vs.

The Washingtonian Publishing Co., Inc., Appellee

Designation of Record

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the Court.

4. The judgment or decree.
5. This designation.
6. Clerk's certificate.

Horace S. Whitman, Gibbs L. Baker, Attorneys for Appellee.

Service of copy admitted this 22nd day of July, 1938.
Elisha Hanson, Eliot C. Lovett, Attorneys for Appellants.

[fol.43] [Endorsed:] In the United States Court of Appeals for the District of Columbia. No. 6921. Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., Appellants, vs. The Washingtonian Publishing Company, Inc., Appellee. Designation of Record. United States Court of Appeals for the District of Columbia. Filed Jul. 22, 1938. Joseph W. Stewart, Clerk. Horace S. Whitman, Attorney at Law, 611 Bowen Building, 815 15th Street, N. W., Washington, D. C.

[fol. 44] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 43, inclusive, constitute a true copy of the transcript of record and proceedings of the said Court of Appeals as designated by counsel for the appellee in the case of Drew Pearson, Robert S. Allen, Liveright, Inc., et al., Appellants, vs. The Washingtonian Publishing Co., Inc., No. 6921, April Term, 1938. as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of July, A. D. 1938.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. (Seal United States Court of Appeals for the District of Columbia.)

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8172)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

vs.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

GIBBS L. BAKER,
HORACE S. WHITMAN,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

vs.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of The Washingtonian Publishing Company, Inc., respectfully shows to this Honorable Court:

I.

Summary Statement of the Matter Involved.

The Washingtonian Publishing Company, Inc., published a magazine called "The Washingtonian." The issue for the month of December, 1931, contained an article called "The Mills of the Gods." This issue was published containing notice of copyright required under the Copyright Statute, U. S. C. A., Title 17, Secs. 9 and 18 (R. 27, (3) and (4)).

Drew Pearson had been employed in the publication of the magazine during the months of October and November, 1931 (R. 10, (b)). Two copies of the December issue of the magazine were deposited in the copyright office, Washington, D. C., on the 21st day of February, 1933 (R. 28, (8)). Between the date of publication of the magazine in December, 1931, and the date of said deposit of copies, Drew Pearson and Robert S. Allen published on August 25, 1932, through Liveright, Inc., a book entitled "More Merry-Go-Round," as written by themselves, and published therein a chapter practically identical with the article "The Mills of the Gods" that had been published in "The Washingtonian" in December, 1931, with the notice of copyright therein. Van Rees Press, Inc., printed the book, and the book "More Merry-Go-Round" contained the usual claim of copyright, and two copies thereof were deposited by Liveright, Inc., in the copyright office, Washington, D. C. (R. 28, (6) and (7)).

On March 8, 1933, the Washingtonian Publishing Company, Inc., filed suit in the District Court of the United States for the District of Columbia for infringement of its copyright against Drew Pearson, Robert S. Allen, Van Rees Press, Inc., and Liveright, Inc. (R. 28, (9)); the latter corporation thereafter became bankrupt and did not appeal from the lower court's decision (R. 34). The lower court made findings of fact and conclusions of law that the publication "More Merry-Go-Round" was an infringement of the copyright of the Washingtonian Publishing Company, Inc., and that company is entitled to damages therefor (R. 27-29). The defendants in the lower court noted an appeal, and that court required them to put up a supersedeas bond of five thousand dollars pending appeal (R. 27-30). Upon appeal to the United States Court of Appeals for the District of Columbia by Pearson *et al.*, that court reversed the lower court, upon the ground that the

deposit of the copies in the copyright office more than a year after the publication, was not a prompt deposit and therefore barred action for infringement by pirating the copyrighted work (R. 33-42).

II.

Question Involved.

The sole question involved is, whether under the Copyright Law enacted March 4, 1909, U. S. C. A., Title 17, Secs. 9 and 18, the *prompt* deposit of copies of the work, containing the copyright notice, in the copyright office, is a prerequisite to the right to maintain an action for the infringement of the copyright obtained under Sections 9 and 18 of that Act.

III.

Reasons Relied Upon for the Allowance of the Writ.

1. The United States Court of Appeals for the District of Columbia has decided an important question of Federal law which has not been, but which should be, settled by the Supreme Court of the United States.

2. The United States Court of Appeals for the District of Columbia has rendered a decision in conflict with the decision of the United States Court of Appeals for the 2nd Circuit, *i. e.*, in *Lumiere* v. *Pathe Exchange*, 275 Fed. 428.

3. The United States Court of Appeals for the District of Columbia has decided an important question of Federal law in a way probably untenable and contrary to the United States Copyright Act.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia commanding that court

to certify and to send to this Court for its review and determination, on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 6921, of the April Term, 1938, Drew Pearson, Robert S. Allen, Liveright, Inc., *et al.*, Appellants, *vs.* The Washingtonian Publishing Company, Inc., and that the said judgment and decree of the said United States Court of Appeals for the District of Columbia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises, as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
By GIBBS L. BAKER,
HORACE S. WHITMAN,
611 Bowen Building,
815 Fifteenth Street N. W.,
Washington, D. C.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the United States Court of Appeals for the District of Columbia was rendered on the 25th day of April, 1938, and has not yet been officially reported. It is printed in the Record ,pp. 33-42.

II.

Jurisdiction.

1. The Act of February 13, 1925, Chapter 229, Sec. 240, 43 Stat. 936, U. S. C. A., Title 28, Sec. 347, provides as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> "(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

2. The judgment sought to be reviewed was rendered by the United States Court of Appeals for the District of

Columbia on the 25th day of April, 1938. The petition for writ of certiorari was filed herein with the Clerk of this Court on the 25th day of July, 1938.

3. The action of the United States Court of Appeals for the District of Columbia in reversing the lower court was a final determination by that court that the Washingtonian Publishing Company, Inc., was not entitled to recover against Drew Pearson, Robert S. Allen and Van Rees Press, Inc., for the infringement of copyright involved.

III.

Statute Involved.

The statute involved is U. S. C. A., Title 17, Sections 9, 12 and 13:

> "SEC. 9. Publication of work with notice.—Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 21 of this title.
>
> "SEC. 12. Deposit of copies after publication; action or proceeding for infringement.—After copyright has been secured by publication of the work with the notice of copyright as provided in section 9 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign State or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have

been produced in accordance with the manufacturing provisions specified in section 15 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 11 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

"SEC. 13. Same; failure to deposit; demand; penalty.—Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

IV.

The Facts.

The facts with the record page references are stated in the petition for writ, pages 1 and 2.

V.

Specification of Error.

The United States Court of Appeals for the District of Columbia erred in holding that failure to make *prompt* deposit of copies in the copyright office, Washington, D. C., barred the petitioner's right to sue for infringement of its copyright secured under Sections 9 and 18 of the Copyright Act (U. S. C. A., Title 17, Secs. 9 and 18).

VI.

ARGUMENT.

Summary of Argument.

1. The question involved is an important question of Federal law.

2. The decision of the United States Court of Appeals for the District of Columbia is in conflict with the decision of the United States Court of Appeals for the 2nd Circuit in the case of *Lumiere* v. *Pathé Exchange,* 275 Fed. 428.

3. The decision of the United States Court of Appeals for the District of Columbia is untenable and contrary to the United States Copyright Act.

Important Question of Federal Law.

1. The Act of March 4, 1909, Chapter 320, U. S. C. A., Title 17, wrought an organic change in the then existing copyright law. Under Section 9 of this Act, a person might for the first time "secure copyright for his work by publication thereof with notice of copyright."

National Cloak, etc., Co. v. *Kaufman,* 189 Fed. 215;
New York Times Co. v. *Star Co.,* 195 Fed. 110.

The United States Court of Appeals for the District of Columbia has held in this case that *prompt* deposit of copies is now a prerequisite to suit for infringement of copyright, following the Court's interpretation of the old law. The question in this case is, therefore, an important question, because it involves not only the protection of a copyright but the very existence thereof.

A copyright is the sole right to use and publish a literary work. Its essence is its exclusiveness. Inability to enforce and protect that exclusiveness destroys the copyright itself, and avoids the language of the statute expressly bestowing that right for a period of twenty-eight years, upon publication with notice of claim of copyright.

Notwithstanding the attempt of the United States Court of Appeals for the District of Columbia to limit its decision to infringement occurring prior to filing of copies, its holding that *prompt* deposit of copies is a condition precedent to suit, must apply equally to any infringement after a tardy filing of copies.

There is no justification whatever for the statement of the United States Court of Appeals for the District of Columbia (R. 41), that there was an apparent abandonment of the copyright. The notice of copyright on the issue of the magazine in question was notice to all the world of the existence of the petitioner's copyright, and the respondents' use of the article in their book must be construed to have been with a full knowledge of the statutory penalties imposed.

Bently v. *Tibbals*, 223 F. (2d C. C. A.), 247, 253;
Stecher Lithographic Co. v. *Dunston Lithograph Co.* (D. C. N. Y.), 233 Fed. 601, 603.

No acts of abandonment of the petitioner's copyright are shown. There has been no interpretation of the pertinent part of Section 12 of the Copyright Law by this Court.

The Decision of the Court Below is in Conflict With the Decision of the Circuit Court of Appeals of the Second Circuit.

2. In the case of *Lumiere* v. *Pathe Exchange*, 275 Fed. 428, the plaintiff, a photographer, sold in June, 1918, to Dolores Casinelli, a motion picture actress, some pictures of her "marked as copyrighted by the plaintiff." In April or May of 1919, the defendants infringed the plaintiff's said copyright. In August, 1919, the plaintiff deposited two copies of each photograph and obtained a certificate of registration for photographs not for sale. Thereafter on August 26, 1919, the plaintiff sued the defendant for infringement, accounting and injunction. On April 17, 1920, Judge Learned Hand dismissed the bill "without costs or prejudice and with leave to commence a new action." All parties appealed.

After deciding that the plaintiff had a right to copyright the photographs, and that his copyright thereof had been infringed by the defendants, the Court held that the plaintiff's delay of some fourteen months in depositing copies did not preclude his suit for infringement which occurred some four months prior to said deposit of copies. In this connection the Court said:

> "The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not 'promptly' followed by deposit of copies as required by the act except by action of the register of copyrights under section 13, which was not taken."

The Court then proceeded to affirm the action of the trial court on the ground that the plaintiff's certificate of registration was for photographs not for sale, and to advise the

plaintiff that, upon proper registration, the plaintiff might maintain another action for said infringement.

In *Mittenthal* v. *Berlin*, 291 Fed. 714, Judge Learned Hand, following the Court of Appeals in the case of *Lumiere* v. *Pathe Exchange, supra,* said:

> "• • • The time of deposit is clearly of secondary importance. Even a failure to deposit promptly does no more under section 12 (Comp. St. sec. 9534) than subject the owner to a demand, failure to comply with which exposes him to a fine of $100 and the cost of the two copies which he should have furnished. He may mend his case even in the event of long delinquency. • • •"

In the case at bar, the pertinent facts are almost identical with those in the *Lumiere* case above cited, except that there are no grounds for dismissal even "without costs or prejudice and with leave to commence a new action" because proper certificate of registration was duly obtained. The petitioner deposited two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the defendants. Nevertheless the Court of Appeals reversed the trial court's decree, holding that the petitioner's copyright was wrongfully infringed by the defendant and that the petitioner is entitled to damages therefor.

The Court of Appeals seeks to distinguish the *Lumiere* case from the one at bar on the strength of Judge Hough's concurring opinion in the former case. It is noted, however, that the other two judges did not concur with Judge Hough.

The Court in the *Lumiere* case would not have indicated that the plaintiff might renew his suit without having decided that the deposit of copies four months after infringement of copyright and fourteen months after the first publication with claim of copyright (facts almost identical with

the facts in the present case) did not bar action or proceedings for such infringement. Consequently, the decision of the court below in the case at bar is directly in conflict with the *Lumiere* case. The English courts place the same construction upon the English Copyright Law as in *Lumiere* v. *Pathe Exchange, supra.*

Goubaud v. *Wallace,* 25 W. R. 604;
Cate v. *Devonshire Newspaper Co.,* 37 W. R. 487.

The Decision of the Court Below is Untenable and Contrary to the Copyright Law.

3. The court below held that *prompt* deposit of copies in the copyright office is a prerequisite to a suit for the infringement of copyright. We contend that a proper construction of the Act requires simply deposit of copies before filing suit.

A statute should be construed in accordance with the manifested intent of the lawmaker. Such intent should be primarily ascertained from the language and context of the Act itself, and next from the purpose and object for which the statute was enacted.

Section 12 of the Act provides that "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to deposit of copies and registration of such work shall have been complied with." The Court of Appeals erroneously imported into this provision of the section the word "promptly," which appears in the first part of the section. To fit the word "promptly" into the last quoted part of the section, the Court found it necessary, in effect, to alter the language by changing the word "until," a word of limitation, to "unless," a word of condition. The former Act of March 3, 1891, 26 Stat. Chap. 566, p. 1107, provided that

> "no person shall be entitled to a copyright *unless* he shall, on or before the day of publication in this or any

> foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian or Congress, at Washington, D. C., a printed copy of the title of the book * * *." (Italics ours.)

Whereas under the present act obtaining a copyright is not conditioned upon deposit of copies although suit for infringement cannot be maintained until copies have been deposited.

Section 13 of the Act prescribes the penalty for failure to file copies *promptly;* it reads in part:

> "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, * * *."

It is significant that here the word "promptly" is used with reference to deposit of copies, as provided in the first part of Section 12; however, in the last part of Section 12, relating to the bringing of suit for infringement, the word "promptly" is not used, although it is used in practically the same phraseology in the first sentence of Section 13 as well as the preceding sentence of Section 12. Had it been intended to require *prompt* deposit of copies as a prerequisite to suit for infringement, the word "promptly" would have been expressly used in that connection.

Section 9 of the Act confers full copyright upon the author upon publication with notice of copyright. This claim of copyright on the publication gives notice to the public of the copyright holder's exclusive right to use and publish. Section 13 provides the sole method of forfeiture of that copyright. Sections 12 and 13 are to be construed together. The decision of the Court of Appeals renders the penalty of voidance of copyright provided by Section 13, but a hollow threat. By the time the penalty becomes applicable it is no longer possible to *promptly* deposit copies, as such prompt-

ness is measured from the date of publication with notice of copyright. As an unenforceable copyright is obviously worthless, the voidance thereof would be an idle gesture. The Court of Appeals relies heavily upon the case of *Koppel* v. *Downing*, 11 App. D. C. 93, and Weil, American Copyright Law (1917) (R. 40). Weil in his work, pages 307-312, expresses considerable doubt as to the meaning of Sections 12 and 13, *supra*. He sets forth the arguments both for and against the construction here contended for. His conclusion is that an adjudication at an early date of the meaning of the "doubtful provisions" of Section 12 "is most desirable." The quotation from Weil in the opinion of the lower court (R. 40), must not be considered alone, but in conjunction with his entire discussion as to the meaning of Sections 12 and 13. His statement of the objects of the Act fails to take into account the organic changes in the law of 1909 granting the copyright without deposit of copies, or the effect of the publication with claim of copyright.

The case of *Koppel* v. *Downing, supra,* has no application to this case. It was decided under a previous act which required deposit of copies as a condition precedent to vesting of copyright. The organic change wrought by the present act in granting full copyright simply upon publication with notice thereof, makes the reasoning in this decision inapplicable to the provisions in question. In the quotation from that case by the Court of Appeals (R. 40), reference is made to a necessity for a "true and correct official registry." Under the present act the public is put upon notice by the requirement of publication with notice of copyright.

Sections 56, 59 and 60 of the present Act, appearing for the first time in the Copyright Law, empower the Register of Copyrights and the Librarian of Congress to destroy or give away copies of copyrighted material. It follows, there-

fore, that Congress did not intend that the copyright office or the Library of Congress should maintain or keep on hand all works deposited there.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.,

Respondents.

SUPPLEMENTAL BRIEF.

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LUTHER ERWIN ANGLE,
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The Daily Record Co. Print, Baltimore.

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The Copyright Law enacted March 4, 1909, U. S. C. A. Title 17, does not require the prompt deposit of copies of the work, containing the copyright notice, in the Copyright Office, as a prerequisite to the right to maintain an action for the infringement of the copyright obtained under Sections 9 and 18 of the Act 1

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SUPPLEMENTAL BRIEF.

The petitioner relies upon its Brief submitted in support of its Petition for Writ of Certiorari and the Supplemental Brief here respectfully submitted.

The opinion herein of the United States Court of Appeals for the District of Columbia is reported in Advanced Sheets for 98 F. (2nd) 245.

THE COPYRIGHT LAW ENACTED MARCH 4, 1909, U. S. C. A., TITLE 17, DOES NOT REQUIRE THE PROMPT DEPOSIT OF COPIES OF THE WORK, CONTAINING THE COPYRIGHT NOTICE, IN THE COPYRIGHT OFFICE, AS A PREREQUISITE TO THE RIGHT TO MAINTAIN AN ACTION FOR THE INFRINGEMENT OF THE COPYRIGHT OBTAINED UNDER SECTIONS 9 AND 18 OF THE ACT.

The Act of March 4, 1909, Chapter 320, U. S. C. A. Title 17, wrought an organic change in the then existing copyright law. All the several prior acts required deposit

of copies of the material to be copyrighted with a designated depository as a condition precedent to vesting of the copyright. Under Section 9 of the present Act, a person for the first time "may secure copyright for his work by publication thereof with the notice of copyright required by this title."

National Cloak, etc. Co. v. Kaufman, 189 Fed. 215;
New York Times Co. v. Star Co., 195 Fed. 110.

As a result of this organic change, all the world is put on notice of copyright ownership by publication of the work with notice of claim of copyright thereon. Deposit of copies of the copyrighted work provided for in Section 12 of the Act now becomes simply a prerequisite to bringing suit for infringement thereof.

In the case at bar, the article was copyrighted pursuant to the present statute by publication thereof with notice of claim of copyright appearing thereon. The petitioner deposited the requisite two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the respondents, and prior to the institution of this suit for infringement. The trial court held that the petitioner had complied with the Copyright Law, even though the deposit of copies and registration were made after the infringement, and that the petitioner's copyright was wrongfully infringed by the respondents, and that the petitioner is entitled to damages therefor (R. 27-30). The United States Court of Appeals for the District of Columbia (hereinafter referred to as the Lower Court) reversed the trial court on the ground that the petitioner failed *promptly* to deposit copies of the article, and therefore could not maintain this suit.

A statute should be construed in accordance with the manifest intent of the lawmaker. Such intent should be ascertained both from the language and context of the Act itself and from the purpose and object for which the statute was enacted.

Section 12 of the Act provides that "No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to deposit of copies and registration of such work shall have been complied with." The Lower Court erroneously imported into this provision of the section the word "promptly," which appears in the first part of the section. To fit the word "promptly" into the last quoted part of the section, the Court found it necessary, in effect, to alter the language by changing the word "until," a word of limitation, to "unless," a word of condition. The former Act of March 3, 1891, 26 Stat. Chap. 566, p. 1107, provided that—

> "no person shall be entitled to a copyright *unless* he shall, on or before the day of publication in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, D. C., a printed copy of the title of the book * * *." (Italics ours.)

Whereas under the present Act obtaining a copyright is not conditioned upon deposit of copies although suit for infringement cannot be maintained *until* copies have been deposited.

Section 13 of the Act prescribes the penalty for failure to file copies *promptly;* it reads in part:

> "Should the copies called for by section 12 of this title not be promptly deposited as provided in this title, * * *."

It is significant that here the word "promptly" is used with reference to deposit of copies, as provided in the first part of Section 12; however, in the last part of Section 12, relating to the bringing of suit for infringement, the word "promptly" is not used, although it is used in practically the same phraseology in the first sentence of Section 13 as well as the preceding sentence of Section 12. Had it been intended to require *prompt* deposit of copies as a prerequisite to suit for infringement, the word "promptly" would have been expressly used in that connection.

Section 9 of the Act confers full copyright upon the author upon publication with notice of copyright. This claim of copyright on the publication gives notice to the public of the copyright holder's exclusive right to use and publish. Section 13 provides the sole method of forfeiture of that copyright. Sections 12 and 13 are to be construed together. The decision of the Lower Court renders the penalty of voidance of copyright provided by Section 13, but a hollow threat. By the time the penalty becomes applicable it is no longer possible to *promptly* deposit copies, as such promptness is measured from the date of publication with notice of copyright. As an unenforceable copyright is obviously worthless, the voidance thereof would be an idle gesture.

That Sections 12 and 13 of the statute should be construed together in the manner set out above, is substantiated by the comments on those sections in the House of Representatives' Report No. 2222, 60th Congress, Second Session, page 11, as follows:

> "*Sections 12 and 13 deal with the deposit of copies, and should be considered together.* They materially alter the existing law, which provides that in order to make the copyright valid there must be deposited

two complete copies of the book or other article not later than the date of first publication. The failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with. The committee felt that some modification of this drastic provision, under which the delay of a single day might destroy a copyright, might well be made. The bill reported by the committee provides that there shall be 'promptly' deposited in the copyright office, or in the mail, addressed to the register of copyrights, two complete copies of the best edition then published, and that no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions with respect to the deposit of copies and the registration of such work shall have been complied with.

"If the works are not promptly deposited, we provide that the register of copyrights may at any time after publication of the work, upon actual notice, require the proprietor of the copyright to deposit, and then in default of deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. It was suggested that the forfeiture of the copyright for failure to deposit copies was too drastic a remedy, but your committee feel that in many cases it will be the only effective remedy; certainly the provision for compelling the deposit of copies by the imposition of a fine would be absolutely unavailing should the copyright proprietor be the citizen or subject of a foreign state." (Italics ours.)

The Decision of the Lower Court is in Conflict With the Decision of the Circuit Court of Appeals of the Second Circuit.

The Federal Courts for the Second Circuit in the leading case of *Lumiere v. Pathe Exchange*, 275 Fed. 428, logically held that Section 12 of the Copyright Law requires simply deposit of two copies of the copyrighted work prior to commencing suit for infringement thereof, as was done in the present case. In the *Lumiere* case, the plaintiff, a photographer, sold in June, 1918, to Dolores Casinelli, a motion picture actress, some pictures of her "marked as copyrighted by the plaintiff." In April or May of 1919, the defendants infringed the plaintiff's said copyright. In August, 1919, the plaintiff deposited two copies of each photograph and obtained a certificate of registration for photographs not for sale. Thereafter on August 26, 1919, the plaintiff sued the defendant for infringement, accounting and injunction. On April 17, 1920, Judge Learned Hand dismissed the bill "without costs or prejudice and with leave to commence a new action. All parties appealed."

After deciding that the plaintiff had a right to copyright the photographs, and that his copyright thereof had been infringed by the defendants, the Circuit Court of Appeals held that the plaintiff's delay of some fourteen months in depositing copies did not preclude his suit for infringement which occurred some four months prior to said deposit of copies. In this connection the Circuit Court of Appeals said, page 430:

> "The plaintiff's copyright was established by the publication with notice of copyright as against all the world whether with or without actual notice and could not be declared void because not 'promptly' followed

> by deposit of copies as required by the act except by action of the register of copyrights under section 13, which was not taken."

That Court then proceeded to affirm the action of the trial court on the ground that the plaintiff's certificate of registration was for photographs not for sale, and to advise the plaintiff that, upon proper registration, the plaintiff might maintain another action for said infringement.

In *Mittenthal v. Berlin*, 291 Fed. 714, Judge Learned Hand, following the Circuit Court of Appeals in the case of *Lumiere v. Pathe Exchange, supra*, said, page 715:

> "* * * The time of deposit is clearly of secondary importance. Even a failure to deposit promptly does no more under section 13 (Comp. St. sec. 9534) than subject the owner to a demand, failure to comply with which exposes him to a fine of $100 and the cost of the two copies which he should have furnished. He may mend his case even in the event of long delinquency. * * *"

In the case at bar, the pertinent facts are almost identical with those in the *Lumiere* case above cited, except that there are no grounds for dismissal even "without costs or prejudice and with leave to commence a new action" because proper certificate of registration was duly obtained. The petitioner deposited two copies and obtained a proper certificate of registration some fourteen months after obtaining its copyright and some six months after infringement thereof by the defendants. Nevertheless the Lower Court reversed the trial court's decree, which held that the petitioner's copyright was wrongfully infringed by the respondents and that the petitioner is entitled to damages therefor (R. 29-30).

The Lower Court and the respondents have practically ignored the facts in the *Lumiere* case. They dwell exclusively upon the matter of inadequate registration which, true enough, was the cause of the suit's dismissal, and utterly disregard material matters of fact and law which the upper and lower courts had to pass upon in order to reach their decision in the case. They seek to distinguish the *Lumiere* case from the one at bar on the strength of Judge Hough's concurring opinion in the former case. It is noted, however, that the other two Judges did not concur with Judge Hough in his limitations of the effect of that decision.

The respondents cite the case of *Ebeling and Reuss, Inc. vs. Raff, Collector, and Wright, Tyndale & Van Roden, Inc.*, 28 U. S. P. Q. 366, as the only one in point. The facts in that case make it wholly indecisive of the present issue. This case involves different sections of the Copyright Law, namely, Sections 1, 11, 30 and 32. The Court's decision on the facts was that the plaintiff had failed to deposit two copies of the copyrighted chinaware prior to institution of its suit and therefore the suit could not be maintained. In referring to Section 12 of the Copyright Law as providing for deposit of copies, the Court quoted the word "promptly." Such is purely *obiter dictum*. It is obvious from a mere reading of the opinion that the Court was in no way concerned with the time element of the deposit of copies, as no deposit of the two copies required as a prerequisite to suit had been made. It is noted moreover that the Lower Court in its opinion in no way referred to the case of *Ebeling and Reuss, Inc. v. Raff, Collector, and Wright, Tyndale & Van Roden, Inc.*

In the *Lumiere* case, on the other hand, in order to reach the decision arrived at, it was necessary to hold, and the upper and lower courts did hold, that under the present Copyright Law it is not necessary to deposit *promptly* copies of the copyrighted work as a prerequisite to suit for infringement of the copyright. As hereinbefore pointed out, all parties appealed from Judge Learned Hand's dismissal of the bill "with leave to commence a new action." Therefore, had not the Circuit Court of Appeals determined that the provisions of Section 12 of the present Copyright Law with regard to deposit of copies as a prerequisite to suit for infringement of copyright, had been met in the *Lumiere* case by the deposit of copies of the copyrighted work, four months after infringement of copyright and fourteen months after the first publication with claim of copyright, (facts almost identical with those in the present case) it would have been constrained to make the matter *res adjudicata* in favor of the defendant by affirming the dismissal by the lower court *without* "leave to commence a new action."

Moreover, neither the upper nor lower court in the *Lumiere* case could have indicated that the plaintiff might renew his suit without having decided that Section 12 of the present Copyright Law does not require *prompt* deposit of copies of the copyrighted work as a prerequisite to suit for infringement of the copyright. Consequently, the decision of the Lower Court is in error and is in direct conflict with the *Lumiere* case.

The English Courts place the same construction upon the corresponding provisions of the English Copyright Law as contended for by the petitioner with respect to the American Copyright Law. Prior to the present British Copyright Law of 1842, it would seem that deposit

of copies and securing of registration was a condition precedent to procuring copyright, but that the Act of 1842, 5 and 6 Vict. c 45, changed the law so as to make deposit of copies and procurement of registration after publication merely a condition precedent to institution of suit for infringement. Section 24 of the British Copyright Act provides:

> "24. No proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceedings in respect of any infringement of such copyright, unless he shall before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of such book pursuant to this act: Provided always, that the omission to make such entry, shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid; provided also that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid."

Although this provision of the British Act is more explicit than the corresponding Section 12 of the American Copyright Law, they are similar in substance. The English Courts' construction of the English Law follow the construction of the American Law urged by the petitioner, and is in accord with *Lumiere v. Pathe Exchange, supra.*

Goubaud v. Wallace, 25 W. R. 604.
Gate v. Devonshire Newspaper Co., 37 W. R. 487.

The Decision of the Lower Court is Untenable and Contrary to the Copyright Law.

There is no justification whatsoever for any innuendo that the petitioner's failure to deposit copies of the copyrighted article was done with malice aforethought to entrap the unwary. The Lower Court in its opinion in the case at bar (R. 35) quotes from the appellant's brief and continues with the following language:

> "And appellee concedes in its brief that no effort was made to deposit copies, as required by the Act, until after counsel were employed to bring suit, thus giving color at least to appellants' innuendo that appellee deliberately waited to see if a financially responsible party would fall into the trap" (R. 36).

And further on in its opinion the same court says:

> "The reasons for promptness of deposit are present today in even greater measure than in earlier years. The liberalizing of the requirement should not be so construed as to defeat its purpose. Appellee's failure to comply with the Act in the present case, coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent." (R. 41).

On the other hand Congress in making the organic change in the Copyright Law in 1909, recognized that "the failure of a shipping clerk to see that the copies go promptly forward to Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with" (H. R. Report, *supra*, p. 11; also see quotation pp. 4 and 5 this brief).

The Lower Court and the respondents are wholly unmindful of the fact that in obtaining its copyright the petitioner gave notice thereof to all the world by publication of the article with notice of claim of copyright thereon. In fact, the respondent, Pearson, had worked with the petitioner through the November, 1931 issue of its publication, and was familiar with the article and publication and knew that the publishing of the article was made under notice of claim of copyright as prescribed by the Copyright Law (R. 5-7; 12-17). Finding of Fact 6 by the Trial Court (R. 28) sets forth that the respondents, Pearson and Allen, published the book, "More Merry-Go-Round" as written by themselves, whereas they took from the "Washingtonian" the entire article written by Rixey Smith and clearly marked on its face with the petitioner's claim of copyright, and published it as a chapter purportedly written by them in their said book "More Merry-Go-Round." They therefore knew, or should have known, that the copyright ownership of the article belonged to the petitioner.

The printers and publishers are answerable to the petitioner for Pearson's and Allen's plagiarism, for the article was copyrighted by publication with notice of claim thereof and proper deposit of copies and registration was made prior to the institution of this suit for infringement, as required by the Copyright Law.

Bentley v. Tibbals, (2nd C. C. A.) 223 F. 247, 253;

Stecher Lithographic Co. v. Dunston Lithograph Co., (D. C. N. Y.) 233 F. 601, 603.

There is no evidence of any kind which even tends to show that the petitioner ever abandoned its copyright or dedicated it to public use. The allegations in that regard

by the respondents and in the opinion of the Lower Court are wholly unfounded. The article published was and is valuable property. The petitioner obtained copyright for a period of twenty-eight years by publication thereof with notice of claim of copyright thereon. The fact that the magazine suspended publication is not indicative in any way of abandonment of its rights acquired, any more than the failure of an author to write additional books would indicate that he had abandoned his property rights in those already published.

We have been unable to find and our opponents have referred to no cases dealing with abandonment of statutory copyright. The two cases cited in this connection by the Lower Court in note 11 to its opinion (R. 40) were not only decided under acts prior to the present Copyright Law enacted March 4, 1909, when deposit of copies was a prerequisite to obtaining copyright, but they do not appear to have any connection with the proposition for which they purport to be cited.

In the opinion of the Lower Court and in the contentions advanced by the respondents, it is erroneously assumed that under the Copyright Law suit for infringement of copyright cannot be instituted unless there has been *prompt* deposit of copies. They seek to justify their unwarranted position on the basis of authorities under prior copyright acts wherein deposit of copies within a specified time was a prerequisite to obtaining copyright. In fact, the very issue itself is whether *prompt* deposit of copies is a prerequisite to suit for infringement, and it is clearly demonstrated herein that copies need not be deposited *promptly* in order to maintain suit for infringement of copyright.

The Lower Court in its opinion relies heavily upon the case of *Koppel vs. Downing,* 11 App. D. C. 93, and *Weil, American Copyright Law* (1917) (R. 40). Weil in his work, pages 307-312, expresses considerable doubt as to the meaning of Sections 12 and 13 of the present Copyright Law. He sets forth arguments both for and against the construction here contended for. His conclusion is that an adjudication at an early date of the meaning of the "doubtful provisions" of Section 12 "is most desirable." The quotation from Weil in the opinion of the lower court (R. 40), should not be considered alone, but in conjunction with his entire discussion as to the meaning of Sections 12 and 13. His indicated opinion that the Copyright Act of March 4, 1909, did not remove the necessity of deposit of copies in order to obtain a copyright, colors his consideration of Sections 12 and 13. His statement of the objects of the Act fails to take into account the organic changes wrought by the Copyright Law of March 4, 1909, by granting copyright simply upon publication of the work with notice of claim of copyright thereon. *He fails to perceive* that notice to all the world is attained under the new law by publication with notice of copyright, and that the prior important requisite of deposit of copies had been relegated to a prerequisite to suit for infringement of copyright.

The case of *Koppel v. Downing, supra,* has no application to this case. It was decided in 1897 under the Act of 1891, (quoted supra page 3), which required deposit of copies as a condition precedent to vesting of copyright. The organic change wrought by the present act in granting full copyright simply upon publication with notice thereof, makes the reasoning in this decision inapplicable to the provisions in question. In the quotation from that

case by the Lower Court (R. 40), reference is made to a necessity for a "true and correct official registry." Under the present act the public is put upon notice by the publication with the statutory notice of copyright.

Sections 59 and 60 of the present Act, U. S. C. A. Title 17, appearing for the first time in the Copyright Law, empower the Register of Copyrights and the Librarian of Congress to destroy or give away copies of copyrighted material during the life of the copyright. It follows, therefore, that Congress did not intend that the Copyright Office or the Library of Congress should maintain or keep on hand all works deposited there in order to have "a true and correct official registry".

The explanation for the above sections is set forth in the House of Representatives' Report No. 2222, 60th Congress, 2d Session, pages 20 and 21, as follows:

> "Section 59 provides for a transfer of books and other articles not needed in the copyright office to certain government libraries.
>
> "Section 60 is inserted for the following reason: The Librarian of Congress states that the volume of the copyright deposits is now enormous and more than 200,000 articles a year are now being added to the great accumulation. Many of these articles are valuable to the library and are used by it. The rest remain in the cellar, and the accumulations there number two millions of articles. There are many articles there that would be useful in other government libraries. Some might be used in exchange for other articles. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit.
>
> "The impression that the deposited articles are a part of the record and are necessary evidence of the thing copyrighted is not well founded. In the

last thirty-eight years there have been only five cases in which articles deposited have been taken into court, and it is said that in none of these cases was there any necessity for such use of the deposited article. It is believed by your committee that the suggestions of the Librarian of Congress embodied in these two sections are wise ones and that the rights of all parties interested are carefully safeguarded."

It is, therefore, apparent that neither the Copyright Office nor the Library of Congress is capable of serving as a true, correct or complete "official registry", nor is intended to be such.

The Analogies Referred to in the Opinion by the Lower Court are not applicable to the case at Bar.

The Lower Court in its opinion (R. 36) expounds its rule of statutory construction and cites a number of cases in support thereof in note 4 thereunder. The cases cited are exemplary of the proposition that where a right or remedy is conditioned upon a certain requirement, that requirement must be met before the right or remedy can be availed of. This proposition is self-evident. But the issue here is, not primarily whether the condition has been complied with, but as to the existence of the condition itself as a matter of law.

In note 7 to the opinion (R. 38), the Lower Court cites several cases in dealing with the interpretation of insurance policies and of suretyship bonds. The present case is not at all analogous for it depends simply upon statutory construction, whereas the insurance policy and the suretyship bond cases cited are matters of interpretation of contracts wherein the court seeks to arrive at

the intention of the parties in the light of existing practices, customs and law. At times a court will vary a contract in the interest of public policy. Such canons of interpretation are obviously not applicable to statutory provisions because in the latter instances the law is to be interpreted in accordance with the manifest intent of the lawmaker and the purpose for which the Act is designed to meet.

In note 14 to the opinion of the Lower Court (R. 42) it is stated that "the situation in the instant case is somewhat similar to that of a reissue of a patent." But in the case of *Caliga v. Inter Ocean Newspaper Company*, 215 U. S. 182, cited by the same court in its opinion, (R. 40, note 11) it is held (p. 189) that reissue of patents is not applicable to copyright.

When the article of the petitioner was published with notice of claim of copyright thereon, the petitioner thereupon obtained a full and complete copyright thereof. Nothing remained to be done in order to vest completely in the petitioner copyright title to the article. As no intervening deficiency of copyright title existed, nor could exist, it clearly follows that no infringer could acquire any rights intervening or otherwise in the said copyright during the lifetime thereof. The fact that the copies were not *promptly* deposited and registration of copyright secured, did not effect the complete title of the copyright in the petitioner and afforded no excuse for the infringement thereof by reason of alleged intervening rights, estoppel or other special plea.

The decision of the Lower Court involves not only the protection of a copyright but the very existence thereof. A copyright is the sole right to use and publish a liter-

ary work. Its essence is its exclusiveness. Inability to enforce and protect that exclusiveness destroys the copyright itself, and avoids the language of the statute expressly bestowing that right for a period of twenty-eight years, upon publication with notice of claim of copyright. Furthermore, notwithstanding the attempt of the Lower Court to limit its decision to infringement occurring prior to filing of copies, its holding that *prompt* deposit of copies is a condition precedent to suit, must apply equally to any infringement after a tardy filing of copies. The Lower Court, in its decision, has therefore practically made *prompt* deposit of copies a prerequisite to obtaining of copyright, contrary to the Copyright Law now in force.

We, therefore, submit that the United States Court of Appeals for the District of Columbia was in error in reversing the action of the trial Court, and this Court should reverse the Court of Appeals and order the remand of the case to the trial Court for further proceedings, as set forth in the Decree of the trial Court (Rec. 29 and 30).

Respectfully submitted,

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER ERWIN ANGLE,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,

Petitioner,

versus

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

GIBBS L. BAKER,
HORACE S. WHITMAN,
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Counsel for Petitioner.

The Daily Record Co. Print, Baltimore.

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Respondents.

PETITIONER'S REPLY BRIEF.

I.

CONSTRUCTION OF THE COPYRIGHT LAW.

The respondents urge a construction of Section 12 of the law that is neither consonant with the general purpose of the copyright law of 1909 as amended nor with the law taken as a whole.

This Court said in a case arising under the copyright law in American Tobacco Co. v. Werckmeister, 207 U. S. 284, at 291:

> "Under this grant of authority (Const. Art. 1, Sec. 8) a series of statutes have been passed, having for their object the protection of the property which the

> author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years. These statutes should be given a fair and reasonable construction with a view to effecting such purpose."

And on page 293 the Court said:

> "As we have seen, the purpose of the copyright law is not so much the protection of the possession and control of the visible thing, as to secure a monopoly having a limited time, of the right to publish the production which is the result of the inventor's thought."

We concede that the secondary purpose of the copyright law in providing the deposit of copies is for the enrichment of the Library of Congress. However, in construing the statute the Court will not allow the provisions relating to the secondary purpose to prevent the carrying out of the primary purpose of the law.

In Platt v. The Union Pacific Railroad Company, 98 U. S. 48, in construing the Land Grants Statute for that Road the Court said:

> "* * * If, as we think it manifest, the leading primary policy of the Act was to place the lands in the hands of the Company, to be used for the completion of the road, as this work progressed, any secondary policy the Government may also have had in view ought not to be allowed to embarrass or defeat that which was primary."

In the case of the American Tobacco Co. v. Werckmeister, *supra*, the Court said further:

> "But in construing a statute we are not always confined to a literal reading, and may consider its

object and purpose, the things with which it is dealing, and the condition of affairs which led to its enactment, so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact."

This case is further borne out by the case of Peck v. Jenness, 7 How. at page 623:

"But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the Legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together."

In Bernier v. Bernier, 147 U. S. 242, Justice Field said at page 246, in reconciling two sections of the Revised Statutes known as the Homestead Act, which, if construed separately, were in conflict:

"* * * This construction will give effect to both sections; and it is a general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act."

'The whole copyright law is to be taken together and construed in the light of the context. The meaning of these sections must be sought in the import of their language and in the object and policy of the Legislature enacting them.' Coffin v. Ogden, 85 U. S. 120.

It is submitted that the purpose of the instant copyright law was to simplify the requirements for a copyright and to give the owner thereof an enforceable copyright when publication was made with the required notice of copyright thereon, and that a reasonable construction of Sections 12 and 13 is, that the prompt deposit of copies is directory but is not made a condition of the validity of the vested copyright. Sections 12 and 13 are to be construed in the light of Section 9, which grants unequivocally a copyright upon publication with notice, and Section 13 prescribes the penalty for failure to promptly deposit the copies.

We submit that the contentions of the respondents and the opinion of the Lower Court fail to take into account the purpose of the Act as a whole and the proper construction to be placed upon it.

The respondents' argument in the brief filed herein on November 16, 1938, is predicated in the main upon two propositions, namely—

(1) That the copyright itself and the right to maintain an action for infringement thereof are entirely separate and distinct;

(2) That prompt deposit of copies of the copyrighted work is essential in order that there be a "true and correct official registry."

II.

COPYRIGHT AND RIGHT TO SUE FOR INFRINGEMENT ARE NOT SEPARATE RIGHTS.

(1) The first proposition is unfounded and unwarranted. It is axiomatic that 'with every right there is a remedy,' "a legal right without a remedy would be an anomaly in the law." Peck v. Jenness, *supra*, at p. 623. Therefore it follows that the right to protect copyright by suit for infringement thereof is a part and parcel of the copyright itself. See Sections 9, 25 to 28 inclusive, and Sections 34 to 40 inclusive of the present law, U. S. C. A. Title 17. It follows, therefore, that the right and remedy constituted the copyright, and any variance therefrom must be expressly provided by statute.

The present copyright law does not provide for separation of the right and remedy, as alleged by the respondents, but merely that certain requisites as to deposit of copies and registration must be met before suit for infringement of copyright may be instituted. The prior copyright acts and amendments thereto, as cited in respondents' brief (Note 1, p. 4), do not separate the right and the remedy. None of the benefits of copyright could be obtained under those prior acts *unless* certain requisites as to publication, registration, and deposit of copies were met.

The respondents on the lower portion of page 10 of their brief, attributed to their allegedly separately created right of suit for infringement of copyright, a retroactive effect. Their purpose is to include infringements occurring prior to their alleged creation of a right to sue. Their net result is the same as that reached by giving ef-

fect to the patent import of the copyright law, namely, that the right and remedy accrue as one upon publication of a work with notice of claim to copyright, and that deposit of copies and registration are simply prerequisites to the institution of suit for infringement.

The respondents' artificial theory of separation and distinct right and remedy appears to have been set up in an attempt to distinguish the analogous provisions of the English Copyright Law set forth in the petitioner's supplemental brief, (pp. 9-10). They seek to distinguish on the fallacious ground that under the English law right to sue for infringement need only be "perfected," whereas under the American law it must be "created." Also, they thus attempt to sustain the holding of the Lower Court, the consequence of which as pointed out in the petitioner's supplemental brief (pp. 17-18), is that a person can have an *exclusive* right to print, publish and vend a work and yet not be able to prevent others from doing the same.

III.

PROMPT DEPOSIT NOT ESSENTIAL FOR OFFICIAL REGISTRY.

(2) The respondents' second proposition that *prompt* deposit of copies is essential in order that there be an "official registry," is equally untenable. The erroneous contention previously advanced by the respondents was that there must be prompt deposit of copies in order that a true and correct public registry of copyright works be available to the public. This contention seems to have been accepted by the Lower Court in its opinion (R. p. 40). The respondents have now abandoned that erroneous position as they admit in effect, on pages 8 and 9 of their brief, that under the copyright law there can-

not be a true and correct official registry of copyrighted material. As a consequence the respondents now rest their argument as to "official registry" upon the registration provisions of the Act.

The principal error in this new position of the respondents is that the copyright law does not *require* registration at any time during the life of the copyright. It need only be registered before a suit for infringement can be filed. The Register of Copyrights is not empowered by law to demand or enforce registration, although he is so empowered with regard to deposit of copies. Consequently there is no necessity or reason, so far as registration is concerned, that copies be *promptly* deposited. In this connection, the assertion in note 3, page 7, of the respondents' brief, that "a claim of copyright is an application for registration" and "not the notice of copyright," is incorrect. A reading of Section 12 as a whole, from which section the respondents quote in part, (Rspdts' Brief, p. 7) discloses that the phrase "claim of copyright," as used therein, clearly refers to the notice of claim of copyright appearing on the publication. Section 10 of the Act also referred to by the respondents does not speak of "claim *of* copyright" but "claim *to* copyright," which a reading of that section clearly discloses to mean the copyright obtained, as provided in the Act. The proposition advanced by the respondents is therefore without merit.

An official registry, as conceived by the respondents, was not contemplated or provided for in the present Copyright Act, nor can such be effected without changing the law.

Referring again to the case of Koppel v. Downing, 11 App. D. C. 93, and the quotation therefrom, (R. p. 40; Rspdts' Brief, pp. 13-14) that case was decided upon facts that showed that Koppel, who had copyrighted and registered the material in question, was not entitled to either the copyright or the registration. The quotation should be read in the light of these facts. The quoted language means that the registration should record only the true ownership of the copyright as regards the persons entitled thereto.

When, as in the present case, an article is copyrighted by copyrighting the magazine in which it appears, and proper registration is obtained, the registration records will contain no information whatsoever in regard to that article.

Respondents state in their brief at page 14, that they "have been able to find only one case wherein the requirement of prompt deposit in Section 12 was before a court." In your petitioner's brief for writ of certiorari and in the supplemental brief are cited the cases of Lumiere v. Pathe Exchange, 245 F. 428, and Mittenthal v. Berlin, 291 F. 714, and in addition to those two cases there are Freedman v. Milnag Leasing Corporation, 20 F. Supp. 802, and Davenport Quigley Expedition, Inc. v. Century Productions, 18 F. Supp. 974; all of aforesaid cases dealt with the deposit requirement of Section 12 which is now in issue.

The respondents, on page 16 of their brief, purport to show that the case of Caliga v. Inter-Ocean Newspaper Company, 215 U. S. 182 does not hold that reissue of patents is not applicable to copyright. By fragmentary quotations from the opinion in that case they at-

tempt to show that the Court held merely that there can be no double copyrighting; just as under patent law there is no authority for double patenting. They fail to quote that provision in the opinion in which the Court stated:

> "There is no provision, as there is in patent law, for an amended application, and, under patent law it has been held that there is no authority for double patenting."

In the last paragraph on page 18 of respondents' brief they cite as an example a newspaper failing to deposit the copies and register the copyrighted issue in order to save $700.00 a year and to "wait and see if any financially responsible party utilized the material contained in any one of the issues." They overlooked the fact that the fee provided in Section 61 of the Copyright Act is for registration only and no fee is charged for the deposit of copies, and registration is not required to be made during the twenty-eight year life of the copyright.

On page 20 of the respondents' brief they are clearly in error as to the statement of facts in regard to Lumiere v. Pathe Exchange, 275 Fed. 428. The facts in that case are correctly set forth in petitioner's brief on Petition for Writ of Certiorari (R. p. 10).

Respectfully submitted,

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER ERWIN ANGLE,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN AND VAN REES PRESS, INC., ET AL.,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF FILED AFTER ORAL ARGUMENT

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At the conclusion of the oral argument of the cause the petitioner understood the Court to grant the respondents' request that they be permitted to file a further brief on the question simply of the meaning of the phrase "claim of

copyright," as used in the Copyright Law. In view of the extended scope of the brief so filed by the respondents and the new matter contained therein, the petitioner respectfully submits the following reply for consideration by the Court:

REGISTRATION OF CLAIM TO COPYRIGHT IS NOT REQUIRED TO EFFECT DEPOSIT OF COPIES UNDER THE COPYRIGHT LAW.

The fallacy of the respondents' contentions in respect to deposit of copies of a copyright work and registration of claim to copyright thereof, is that the Copyright Law provides for deposit of copies as a prerequisite to registration (Title 17 U. S. C. A., Sec. 10) and *not* registration as a requisite to deposit of copies. For the first time the respondents in their Supplemental Brief contend that "registration must be obtained at the same time that copies are deposited." They erroneously predicate the alleged requirment upon Section 11, which deals exclusively with *un*published works, and upon the latter part of Section 12 (quoted on page 2, Respdts.' Supp. Brief) where the phrase "claim of copyright" relates exclusively to *un*published works (referred to in Section 11) and not to published works. In the case at bar, the article was *published* with notice of copyright as prescribed by the Copyright Law.

Section 11 and that portion of Section 12 referred to above, provides that copyright of an *un*published work cannot be had *unless* a copy thereof is deposited together with a "claim of copyright." The "claim of copyright" corresponds to the notice of copyright on a published work. It is the owner's formal declaration of his copyrightable interest in the unpublished work.

The Copyright Law prescribes no form for the "claim of

copyright," as it does for "notice of copyright" (Sec. 18). The Copyright Office, in its Rules and Regulations (Copyright Office Bulletin, No. 15, issued 1926) indicates in parenthesis in Sections 22 and 23 that the "claim of copyright" for unpublished works should preferably take the form of an application for registration and not that registration need be effected unless such is desired (17 U.S.C.A. following Sec. 53, pp. 180, 183). The respondents, on page 3 of their Supplemental Brief, have cited and quoted from said part of the Rules and Regulations, but have failed to disclose that said part is entitled *"How to Secure Registration."*

In a further attempt to support their erroneous position, the respondents cite Sections 54 and 55 of the Copyright Law. Section 54 provides in its pertinent parts that "whenever deposit has been made in the copyright office of a copy of any work under the provisions of this title, he [the register of copyrights] shall make entry thereof" in his records. And Section 55 provides in its pertinent parts that "in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office," containing certain prescribed information. Section 54 would be useless if registration was required at the time of deposit of copies as Section 56 provides for recording of all copyright registrations, and does *not* refer to articles that are only deposited. Furthermore, contrary to the contention of the respondents, the entry provided for in Section 55 does not contain the information which appears on the certificate of registration because said entry does not record registration but merely deposit of copies. The application for registration is the source of the information contained in the certificate of registration. The entry in question is to show that the copies have been deposited which, under Sec-

tion 10, is a prerequisite to registration of a claim to copyright and the issuance of a certificate of registration.

The Copyright Law does not *require* registration of a claim to copyright at any time during the life of the copyright. The registration fee provided by the Act is not to raise revenue, but is to defray the cost of registration if and when sought by the copyright owner.

Section 56 of the Copyright Law, quoted in part on page 5 of the respondents' Supplemental Brief, imposes on the Register of Copyrights the duty of indexing, cataloguing and publishing certain information as he *may* have, for Sec. 10 (the registration provision of the Act) provides merely that a "person *may* obtain registration of his claim to copyright * * *." Sections 57 and 58 make such information available to the public. No "official registry" as conceived by the respondents, is contemplated in the Act, nor can such be effected without materially changing the law.

The reason for the requirement that copies of a published work be deposited in order to obtain registration of a claim to copyright thereof, is that the Copyright Office have proof of the existence of the copyright sought to be registered. The purpose of registration, in turn, is simply to provide *for the benefit of the copyright owner* a permanent record of his copyright and to facilitate the matter of proof thereof. That portion of Section 56 of the Copyright Law not quoted by the respondents, provides that "the current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards any copyright registration."

In the case at bar, copyright attached to the article by virtue of Section 3 of the Copyright Law as the magazine containing the article was published with notice of copy-

right thereon in accordance with the Copyright Law. Registration, deposit of copies and any other like steps taken in the matter do not serve to spread upon the records of the Copyright Office or the Library of Congress, or elsewhere, any information regarding a particular article contained in a copyrighted magazine. Consequently the respondents' arguments are not only unfounded, but are clearly inapplicable to the present case.

Respectfully submitted,

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Supreme Court of the United States

October Term, 1938

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DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., in opposition to the petition filed herein by The Washingtonian Publishing Company, Inc., for a writ of certiorari to the United States Court of Appeals for the District of Columbia, respectfully state to this Honorable Court:

I

THE FACTS

In December, 1931, and for some time prior thereto, the petitioner was the owner and publisher at Washington, D. C., of a monthly magazine of general circulation called THE WASHINGTONIAN. On December 10, 1931, the petitioner published an issue of THE WASHINGTONIAN claiming copyright upon the contents thereof by means of

the usual printed notice. However, the claim was not thereupon registered and copies were not thereupon deposited in the Copyright Office. The said December issue contained, among other material, a featured article entitled "The Mills—of the Gods" written by one Rixie Smith under the pen name of Linthicum Hall. *The petitioner discontinued publication after this issue.*

On August 25, 1932, Liveright, Inc., one of the defendants below, published and offered for general sale a book entitled "More Merry-Go-Round" written by respondents Pearson and Allen and printed by respondent Van Rees Press, Inc. This book included a chapter entitled "The Wizards of Reconstruction" which contained matter practically identical with the said article by Rixie Smith in the December, 1931, issue of THE WASHINGTONIAN.

Copyright of the book "More Merry-Go-Round" was claimed by means of the usual printed notice and, on August 26, 1932, Liveright, Inc., the publisher thereof, deposited two copies of the said book, together with the claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration. On December 14, 1932, the last edition of "More Merry-Go-Round" was printed.

On February 21, 1933, petitioner deposited copies of the December, 1931, issue of THE WASHINGTONIAN, together with claim of copyright, in the Copyright Office, paid the fee, and secured a certificate of registration. On the same day petitioner likewise deposited copies and obtained registrations of claim of copyright of the other eleven issues—January through November—of 1931.

On March 8, 1933, petitioner instituted this suit alleging infringement of the article appearing in the December, 1931, issue of THE WASHINGTONIAN.

All of the foregoing facts were found by the District Court and appear in the "Findings of Fact". (R. 27-28.)

Liveright, Inc., was adjudged bankrupt in June, 1933, and was not thereafter concerned with this proceeding. The trial occurred in February, 1935.

On March 28, 1935, the District Court, through Mr. Justice Letts, rendered an opinion (R. 23-26) finding the foregoing facts and holding that the bill should be dismissed because of the failure of The Washingtonian Publishing Company to comply with the provisions of the Copyright Act requiring the prompt deposit of copies.

In February, 1936, Mr. Justice Letts granted a rehearing. During the latter part of October, 1936, he notified counsel for the parties that he would decide in favor of the petitioner but that there would be *no opinion.* Findings of Fact and Conclusions of Law (R. 27-29) and a Decree (R. 29-30) were filed in December, 1936.

An appeal was taken to the United States Court of Appeals for the District of Columbia and, in April, 1938, that Court reversed the District Court upon the ground that the Copyright Act did not give retroactive effect to "grossly tardy compliance" with the law, and that petitioner could not thus establish, *ab initio,* its right to maintain an action against one who in the interim had acted adversely to its interest. (R. 42.)

II

QUESTION PRESENTED

The question presented is whether a copyright claimant who has failed to comply with the provision of the Copyright Act requiring *prompt* deposit of copies may maintain an action for an alleged infringement occurring long after publication and long before any effort whatsoever has been made to deposit copies.

III

STATUTE INVOLVED

Although incidental reference may be made to other provisions of the Copyright Act of 1909, as amended, the sec-

tion which gives rise to the question presented is Section 12 (35 Stat. 1078, 17 U. S. C. A. § 12). Insofar as it is pertinent to this discussion that section provides:

> "That after copyright has been secured by publication of the work with the notice of copyright as provided in Section 9 of this Act, there shall be *promptly deposited* in the Copyright Office or in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . to be accompanied in each case by a *claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.*" (Emphasis supplied.)

IV

SUMMARY OF ARGUMENT

1. The case presents no difficulties; it merely afforded the appellate court an opportunity to apply fundamental rules of statutory construction enunciated by this Court.

2. There is no conflict with the Second Circuit, and there is complete harmony with the only case in point.

V

ARGUMENT

Point 1. The case presents no difficulties; it merely afforded the appellate court an opportunity to apply fundamental rules of statutory construction enunciated by this Court.

It is a well recognized rule of statutory construction that there must be substantial compliance with the statute; and that every act required which is jurisdictional or of the essence of the proceedings, or prescribed for the benefit of

the party to be affected thereby, *must* be done. This rule applies to copyrights. See Sutherland on *Statutory Construction* (2d Ed., Vol. II, pp. 1140, 1142). The application of the general rule to copyrights was recognized by this Court in *Wheaton* v. *Peters*, 8 Pet. 591, 665, 8 L. ed. 1055, 1082:

> "*All the conditions are important; the law requires them to be performed;* and consequently *their performance is essential to a perfect title.* On the performance of a part of them the right vests; and this was essential to its protection under the statute; but other acts are to be done, *unless Congress have legislated in vain,* to render the right perfect." (Emphasis supplied.)

Many cases have reflected this pronouncement, including *Freeman* v. *The Trade Register, Inc.*, 173 Fed. 419. 421; *New York Times Co.* v. *Sun Printing & Publishing Association*, 204 Fed. 586; *Universal Film Manufacturing Co.* v. *Copperman*, 212 Fed. 301; *E. I. Horsman & Aetna Doll Co.* v. *Kaufman*, 286 Fed. 372; and *United Thrift Plan, Inc.* v. *National Thrift Plan, Inc.*, 34 F. (2d) 300.

The requirement of Section 12 is so very clear that it really needs no interpretation or elaboration. However, for convenience, and in order to incorporate the references therein, it may well be read as follows:

> "No action or proceeding shall be maintained for infringement of copyright in any work until two copies of the work shall have been *promptly* deposited in the Copyright Office as above required, and registration of the claim to copyright has been secured pursuant to Section 10." *

---

* Section 10 provides "That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act." 17 U. S. C. A. §10.

In order to give effect to the requirement of *prompt* deposit of copies no other construction of Section 12 is possible. This fact was recognized by the appellate court in its decision (R. 38):

> "It must be conceded that appellee [petitioner] could not maintain an action for infringement at the time of publication of 'More Merry-Go-Round' or for six months thereafter. Fourteen months having elapsed since publication and claim of copyright, and six months having elapsed since the alleged infringement, appellee [petitioner] undertakes to comply with the Statute and thus to remove the restriction which impedes action. What must it do? *Section 12 provides that it must promptly deposit two copies. It does not say merely to deposit, but that the deposit must be promptly made; and promptness must be measured from the date of publication. Unless it can be said, therefore, that a delay of fourteen months is promptness, appellee [petitioner] has failed to comply with the Act.*" (Emphasis supplied.)

The court had no difficulty in finding (R. 39) that petitioner's delay of fourteen months could, in no sense, be deemed prompt deposit. As a matter of fact, petitioner itself has never contended that its deposit of copies was promptly made as required by Section 12. Therefore, the appellate court only had to decide whether the petitioner's failure to deposit copies as contemplated by the statute prevented the maintenance of an action against respondents for the use of certain material six months before petitioner made any effort to deposit copies of the publication containing such material. The court concluded (R. 42) that the petitioner could not maintain an action under such circumstances and cited, as an additional reason, the fact that respondents may have acquired intervening rights (R. 42, footnote) as against petitioner because of the latter's tardiness in depositing copies.

Point 2. There is no conflict with the Second Circuit, and there is complete harmony with the only case in point.

Counsel for petitioner refer to *Lumière* v. *Pathé Exchange*, 275 Fed. 428, as the only American case decisive of the point here raised. The only trouble is that the facts make it inapplicable. It involves solely the question of a proper *registration* of copyright, the registration which was first secured having been inadequate for the purpose intended.

The copyright in question was that of a photograph. Under the law it was necessary promptly to deposit one copy if the article were not to be reproduced for sale and two copies if it were. In each case a certificate of registration was only required before a suit for infringement could be instituted, but where no sale was contemplated it was not necessary to include in the certificate the date of first publication, whereas if sale were contemplated the date of the publication was required to be set forth.

Inasmuch as sale was contemplated, *two copies of the photograph were promptly deposited* as required. However, the certificate of registration gave no date of publication and therefore was only good for photographs *not* to be reproduced for sale. This was the situation when the suit was instituted for infringement of the copyright. The District Court dismissed the bill without prejudice to the right of the plaintiff to institute another action after he had secured a certificate of registration for photographs to be reproduced for sale. Both parties appealed, each contending that a decree should have been entered on the merits in his favor.

The Circuit Court of Appeals for the Second Circuit affirmed the action of the District Court in dismissing the bill but, in addition, stated that "the right to recover for infringement committed before a certificate of registration for copies to be reproduced for sale had been obtained

would continue." *There was no question concerning the deposit of copies "promptly" or otherwise.* There had been full compliance with the statute in this regard. In fact, the law had been complied with in every respect except furnishing the date of publication. The name of the proprietor of the copyright was given; the subject of the copyright was described; and two copies of the copyrighted article were available for inspection by any parties interested. The fundamental requirement of the law, as expressed in *Koppel* v. *Downing*,* 11 App. D. C. 93, had thus been met. The only question involved was the *incompleteness of the registration.* The Copyright Act does not require prompt registration; in fact, there is no registration actually required unless suit is contemplated. Section 10 provides that any person "*may* obtain registration of his claim to copyright", but Section 12 provides that two copies "*shall* be promptly deposited".

The appellate court considered the *Lumière* case and concluded (R. 41-42) that it—

> ". . . did not decide the question of the present case. The Court in that case expressly avoided consideration of 'Other important and difficult questions depending upon the construction of the Copyright Act . . .' And in his concurring opinion, Hough, J., said:

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* In that case the court stated (p. 104):

". . . The law of copyright, while securing a long continued monopoly, contemplates, and the policy of it requires, that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public. . . ."

Later in the same case the court quoted (p. 106) from *Boucicault* v. *Hart*, 13 Blatch. 47, 54 (wherein the plaintiff had claimed that his right was sufficiently perfected by filing the title page only), the observation—

". . . that an author or inventor must put his claim in the form of a well-defined specification, work or composition, and so place it on record, so that he cannot alter it to suit his circumstances, and so that other authors and inventors may know precisely what it is that has been written or invented."

'I agree with the foregoing opinion *as far as it goes.* There are, however, two points for which this decision will by inference be thought authority and as to which I do not wish to be concluded. They are: (1) . . . and (2) whether in any form of action plaintiff can recover damages for infringements committed *before he* not only registered his claim of copyright, but *deposited the requisite number of* copies.' (Italics supplied.)

"Judge Hough's second reserved point is the one with which we are concerned."

The petitioner also refers (brief, p. 12) to certain English cases and asserts that the English courts placed the same construction upon the English copyright law as our Court of Appeals for the Second Circuit placed upon our Copyright Act in the *Lumière* case. Even so, it can make no difference because only the question of *registration* was involved. The question of prompt deposit could not possibly be involved in any English case because *under the English law there was no requirement for the deposit of copies either promptly or at any time whatsoever.* In fact, the law specifically stated that only registration was required, and this could safely be accomplished at any time prior to the institution of a suit for infringement. (See *Literary Copyright Act,* 1842, 5 and 6 Victoria, c. 45, under which the said English cases arose.)

Instead of the *Lumière* case being the only American case directly in point, as the petitioner would have this Court believe, that distinction must be accorded the more recent (1935) decision of the District Court for the Eastern District of Pennsylvania in *Ebeling & Reuss, Inc.* v. *Raff, Collector, and Wright, Tyndale & Van Roden, Inc.,* 28 U. S. P. Q. 366. That case involved the specific question of prompt deposit and the Court held that neglect to observe the statutory requirement was fatal to the right to maintain any action regardless, apparently, of whether the alleged infringement occurred before or after the tardy

deposit. The appellate court herein did not go that far, but limited its decision to publications appearing *before* deposit by the dilatory claimant. However, the two cases are in entire harmony in recognizing the fact that the requirement of prompt deposit is definitely related to the maintenance of an action of infringement. The petitioner recommends that the requirement be *ignored,* or at least considered in connection with some other section of the statute. The respondents rely upon the Copyright Act as it was enacted by the Congress. Unless and until it is appropriately changed a claimant cannot maintain an action under the circumstances of this case.

VI

SUMMARY AND CONCLUSION

Petitioner published and claimed a copyright in December, 1931; respondents published, deposited copies and claimed a copyright on similar material eight months later, in August, 1932; and petitioner deposited copies in February, 1933, fourteen months after its own publication and six months after respondents' publication. According to Section 12 of the Copyright Act no copyright claimant may maintain any action for infringement until it has promptly deposited copies of its work after publication and secured registration thereof. The appellate court found no difficulty in applying the fundamental rule of statutory construction and requiring substantial compliance with the terms of Section 12 in regard to deposit of copies. There could be but one result. Petitioner's right to maintain an action against respondents for a publication occurring *before* it had made any effort to comply with the statute was barred. As noted (R. 42) by the appellate court, it is not necessary to determine whether petitioner would have any right to maintain the action if the publication in question had occurred *after* petitioner's tardy deposit of copies.

The *Lumière* case, which petitioner contends is decisive of the point here presented, did not even involve any question of prompt deposit but only of *incompleteness of registration.* The *Ebeling & Reuss* case is the only one which involved *prompt deposit* and there it was held that strict compliance with the statute was necessary. In the instant case the appellate court was not required to go that far in its ruling because the respondents utilized the material in question many months *before* petitioner made any effort to comply with the requirement regarding deposit.

The present case involves an isolated question. The decision is not in conflict with that of any other court. Only fundamental rules of statutory construction are involved and their application here presents no unusual problem. The Court of Appeals for the District of Columbia merely followed and applied established principles which could here lead only to one conclusion—judgment for respondents. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ELISHA HANSON,
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729 Fifteenth Street,
Washington, D. C.

September 10, 1938.

FILE COPY

NOV 16

In The

Supreme Court of the United States

October Term, 1938

No. 222

The Washingtonian Publishing Company, Inc.,
Petitioner,

v.

Drew Pearson, Robert S. Allen and Van Rees Press, Inc.,
Respondents.

RESPONDENTS' BRIEF

Elisha Hanson,
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November 15, 1938.

EYNON PRINTING CO., INC., WASHINGTON, D. C.

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* Refers to footnote.

IN THE

Supreme Court of the United States

October Term, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

RESPONDENTS' BRIEF

I

THE FACTS

The undisputed and material facts appear in chronological order in the District Court's Findings of Fact (Record, pp. 27-28) but they are incorporated herein for the greater convenience of this Court.

In December, 1931, and for some time prior thereto, the petitioner was the owner and publisher at Washington, D. C., of a monthly magazine of general circulation called THE WASHINGTONIAN. On December 10, 1931, the pe-

titioner published an issue of THE WASHINGTONIAN and secured copyright thereof by means of the usual printed notice. However, *the claim to copyright was not thereupon registered and copies of the work were not thereupon deposited* in the Copyright Office. The said December issue contained, among other material, a featured article entitled "The Mills—of the Gods" written by one Rixie Smith under the pen name of Linthicum Hall. *The petitioner discontinued publication after this issue.*

On August 25, 1932, Liveright, Inc., one of the defendants below, published and offered for general sale a book entitled "More Merry-Go-Round" written by respondents Pearson and Allen and printed by respondent Van Rees Press, Inc. This book included a chapter entitled "The Wizards of Reconstruction" which contained matter practically identical with the said article by Rixie Smith in the December, 1931, issue of THE WASHINGTONIAN.

Copyright of the book "More Merry-Go-Round" was secured by means of the usual printed notice and, on August 26, 1932, Liveright, Inc., deposited two copies of the said book, together with the claim of copyright, in the Copyright Office, paid the fee, and obtained a certificate of registration. On December 14, 1932, the last edition of "More Merry-Go-Round" was printed.

On February 21, 1933, petitioner deposited copies of the December, 1931, issue of THE WASHINGTONIAN, together with claim of copyright, in the Copyright Office, paid the fee, and secured a certificate of registration. On the same day petitioner likewise deposited copies and obtained registration of the claims to copyright of the other eleven issues—January through November—of 1931.

On March 8, 1933, petitioner instituted this suit alleging infringement of the article appearing in the December, 1931, issue of THE WASHINGTONIAN.

Liveright, Inc., was adjudged bankrupt in June, 1933, and was not thereafter concerned with this proceeding. The trial occurred in February, 1935.

On March 28, 1935, the District Court, through Mr. Justice Letts, rendered an opinion (R. 23-26) finding the foregoing facts and holding that the bill should be dismissed because of the failure of The Washingtonian Publishing Company to comply with the provisions of the Copyright Act requiring prompt deposit of copies.

In February, 1936, Mr. Justice Letts granted a rehearing. During the latter part of October, 1936, he notified counsel for the parties that he would decide in favor of the petitioner but that there would be *no opinion*. Findings of Fact and Conclusions of Law (R. 27-29) and a Decree (R. 29-30) were filed in December, 1936.

An appeal was taken to the United States Court of Appeals for the District of Columbia and, in April, 1938, that Court reversed the District Court. A petition for a writ of certiorari was granted by the Supreme Court of the United States on October 10, 1938. (R. 45.)

II

SUMMARY OF RESPONDENTS' CONTENTIONS

The respondents do not contend that the petitioner did not secure a valid copyright of the December, 1931, issue of THE WASHINGTONIAN upon publication of the work with notice of copyright. However, they do contend that the conditions prescribed by the Copyright Act must be fulfilled in order to enable a copyright proprietor to support his ownership of the copyright by suit.

The respondents contend that, in order to vindicate its ownership of the copyright in question by suit, the petitioner must have first secured a right to sue by strictly fulfilling the requirements of the Act both as to prompt deposit, with the Register of Copyrights, of two copies of the work after publication and also as to securing registration thereof. (The petitioner denies that prompt deposit is necessary and alleges a right to maintain an action for infringement regardless of when the deposit of copies was made or the reg-

istration effected just so they occurred prior to the actual institution of the proceeding.)

The respondents further contend that, even though prompt deposit were held to be unnecessary, there is precluded any right of action for an infringement occurring *before* a late deposit of copies and registration of the work.

III

ARGUMENT

Point 1. The copyright and the right to vindicate the ownership thereof by suit are separately created.

When the Congress enacted the Copyright Act it did not sanction an existing right but created an entirely new one. *Caliga* v. *Inter-Ocean Newspaper Co.*, 215 U. S. 182, 54 L. ed. 150. The importance of strict compliance with the provisions of the Act has frequently been recognized. *Wheaton* v. *Peters*, 8 Pet. 591, 665, 8 L. ed. 1055, 1082; *Freeman* v. *The Trade Register, Inc.*, 173 Fed. 419, 421; *New York Times Co.* v. *Sun Printing & Publishing Association*, 204 Fed. 586, 587; *United Thrift Plan, Inc.*, v. *National Thrift Plan, Inc.*, 34 F. (2d) 300.

Prior to the enactment of the present Copyright Act (March 4, 1909, 35 Stat. L. 1075, 17 U. S. C. § 1) the copyright itself and also the right to maintain an action for infringement thereof were obtained *at the same time and, for the most part, in the same manner.*[1] When the conditions

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[1] (a) The Act of 1790, 1 Stat. 125, provided that no person should have the "benefit" thereof "unless he shall *before publication* deposit a printed copy of the title of such map, chart, book or books, in the clerk's office of the district court where the author or proprietor shall reside". Provision was also made for publication in a newspaper, within *two months*, of the clerk's record; also for delivery, within *six months*, of one copy of the work to the Secretary of State, but there was no penalty for failure in either of these re-

precedent to the creation of the copyright were fulfilled the right to maintain an action for the infringement thereof was *automatically created.*

The present Copyright Act introduced radical changes. It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the

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spects. The copyright was for a term of 14 years "from the recording the title thereof in the clerk's office".

(b) The Act of 1802, 2 Stat. 171, provided that, in addition to the requirements of the Act of 1790, a person seeking to obtain a copyright should, "before he shall be entitled to the benefit of the act" cause the clerk's record to be inserted "at full length in the title-page or in the page immediately following the title of every such book or books; and if a map or chart, shall cause the following words to be impressed on the face thereof, viz: '*Entered according to the act of Congress, the day of 18* (here insert the date when the same was deposited in the office) *by A. B. of the State of* (here insert the author's or proprietor's name and the State in which he resides).'" This is the first time that any notice was required to appear in the work for which copyright was being sought.

(c) The Act of 1831, 4 Stat. 437, continued to withhold the statutory benefits unless a copy of the title of the work was deposited in the district court clerk's office *before publication* and unless "information of copyright being secured" was given by *notice* appearing on the work as specifically prescribed. One copy of the completed work was required to be delivered to the clerk within *three months* after publication, and once every year the clerk was required to transmit to the Secretary of State a certified list of his copyright records, together with the copies of the works deposited in his office. There was no penalty for failure to deposit the copy of the completed work. The copyright term was extended to 28 years.

(d) The Act of August 10, 1846, 9 Stat. 106, to establish the Smithsonian Institution provided that every copyright proprietor should, *within three months* after publication, transmit one copy of his work "to the Librarian of the Smithsonian Institution, and one copy to the Librarian of

notice of copyright.[2] However, the ownership of a copyright does not create a right to maintain a suit for infringement. As stated in *New York Times Co.* v. *Star Co.*, 195 Fed. 110, 111: "Ownership of copyright and the vindication of such ownership by suit are *different things.*" This fact was recognized by the appellate court herein. (R. 41.)

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[2] Section 9 of the Copyright Act (35 Stat. 1077, 17 U. S. C. § 9) provides that "any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, . . ."

Congress Library". This marked the advent of the Congressional Library into the copyright picture.

(e) The Act of 1865, 13 Stat. 540, required that a printed copy of every work "for which a copyright shall be secured" should be transmitted to the Library of Congress *within one month of the date of publication.* Failure to deposit had no effect upon the copyright or the right to sue, but such failure made it "the *duty of the Librarian of Congress to make demand* thereof in writing, at any time within *twelve months* after the publication thereof; and in default of the delivery thereof within *one month* after the demand shall have been made, the right of exclusive publication secured to such proprietor under the acts of Congress respecting copyright shall be forfeited." (Compare Section 13 of the Act of 1909, note 10 herein, post, p. 12.)

(f) The Act of 1870, 16 Stat. 213, provided that "no person shall be entitled to a copyright" unless, *before publication,* he deposited a copy of the title of the work addressed to the Librarian of Congress, and unless, ***within ten days after publication,*** he similarly deposited two copies of the work. However, copyright was initially "granted for the term of 28 years from the time of recording the title thereof". For the first time, this Act required the Librarian of Congress to keep an official record of every copyrighted work and information pertaining thereto. Also, for the first time, this Act provided that "no person shall maintain an action for infringement of his copyright unless he shall give

The things which must be done in order to create a right to maintain an action for infringement of copyright are set forth in Section 12 of the present Copyright Act (35 Stat. 1078, 17 U. S. C. § 12). Insofar as it is pertinent to this case that Section provides:

> "That after copyright has been secured by publication of the work with the notice of copyright as provided in Section 9 of this Act, there shall be ***promptly deposited*** in the Copyright Office or in the mail, addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . to be accompanied in each case by a *claim of copyright.*[3] *No action or pro-*

[3] A "claim of copyright" is an application for registration under Section 10 (see note 4); it is not the notice of copyright. The application, in the case of a periodical, requires the full legal name and address of the copyright owner by whom the "copyright is claimed"; the title of the periodical; the place and date of publication; the name and location of the printer; and the date when the issue in question was first publicly distributed, as this marks the beginning of the copyright term. This information, together with the date of the receipt of the copies, and also other facts in the case of books, is entered upon the records of the Copyright Office and becomes a part of the *official public registry.*

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notice thereof" by inserting in each copy a statement that the work had been "Entered according to act of Congress, in the year , by A. B., in the office of the Librarian of Congress, at Washington." Therefore, under this Act, although copyright were secured upon deposit of title, it was nullified if copies were not deposited within ten days, and no suit could be maintained if the work were published without notice of copyright.

(g) The Act of 1891, 26 Stat. 1107, provided that there should be no copyright unless a copy of the title was deposited "*on or before the day of publication*", and unless two copies of the work itself were deposited "not later than the *day of publication*".

ceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration[4] *of such work shall have been complied with.*" (Emphasis supplied.)

Registration of claim to copyright, as provided by Section 10[5], includes the deposit of copies under Section 12, but is not mandatory except in connection with suit for infringement. Then it becomes just as essential as deposit. As a matter of fact, registration is of more lasting importance than deposit because Sections 59[6] and 60[7] of the Act

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[4] Section 10 (35 Stat. 1078, 17 U. S. C. § 10) provides that "such person *may obtain registration of his claim* to copyright by complying with the provisions of this Act, *including the deposit of copies*, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Title." (Emphasis supplied.)

[5] See note 4.

[6] Section 59 (35 Stat. 1087, 17 U. S. C. § 59) provides:
"That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein."

[7] Section 60 (35 Stat. 1087, 17 U. S. C. § 60) provides:
"That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years it is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed:

authorize the disposition of copyrighted material even during the term of the copyright. However, the official entries of the Copyright Office continue as a perpetual registry and are obviously intended as such, petitioner's statement to the contrary (Supp. brief, p. 16) notwithstanding.

The fact remains that the very foundation of the right to maintain an action for infringement is deposit of copies and registration of the work. Neither of these has the slightest bearing upon the creation of the copyright itself under Section 9. That is obtained merely by publication with notice as required by the Act.

Inasmuch as no question is raised as to the copyright secured by petitioner it is only necessary to consider whether petitioner had any right of action at the time respondents utilized the material in question.[8]

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[8] Counsel for petitioner apparently seek to question the motives of the respondents when they state (Supp. brief, p. 12) that respondent Pearson "had worked with the petitioner through the November, 1931, issue of its publication, and was familiar with the article and publication and knew that the publishing of the article was made under notice of claim of copyright as prescribed by the Copyright Law (R. 5-7, 12-17)." But if counsel were to divulge the other facts appearing on the record pages cited and bearing upon the point it would appear that—

"*Provided*, That there shall be printed in the Catalogue of Copyright Entries from February to November, inclusive, a statement of the years of receipt of such articles and a notice to permit any author, copyright proprietor, or other lawful claimant to claim and remove before the expiration of the month of December of that year anything found which relates to any of his productions deposited or registered for copyright within the period of years stated, not reserved or disposed of as provided for in this Act;

"*And provided further*, That no manuscript of an unpublished work shall be destroyed during its term of copyright without specific notice to the copyright proprietor of record, permitting him to claim and remove it."

Point 2. Petitioner, by its failure promptly to deposit copies and to secure registration of the December, 1931, issue of its magazine, became forever barred from maintaining an action for infringement of copyright thereof.

We have already shown that the present Copyright Act is the first to separate the copyright from the right of action for infringement thereof, and that a right of action does not exist until deposit of copies and registration of the work. This Act is also the first to require that copies be deposited *promptly* instead of within a specific time limit.

Of course, the word "promptly" may refer to different periods of time, depending upon the circumstances, although in the present case not even the petitioner has suggested that a delay of 14 months could conceivably be so classified. However, there can be no question but that, if a particular deposit be held to be promptly made, *any* infringement of that work could be made the subject of an action by the copyright proprietor. This would be true even though the infringement took place in the interval between publication and the actual deposit of copies and the registration of the work.

" . . Pearson states that he had a perfect right to the full use of the said article; that by letter and check dated July 22, 1932, he purchased, and paid the said Rixie Smith for, the privilege of such use; . . . that the said Rixie Smith . . . released to The Washingtonian Publishing Company no rights whatsoever to copyright or otherwise appropriate to its exclusive use the said article in whole or in part, and that the said Smith claimed to have retained the rights to the said article; . . . that the company . . . was without funds to pay for the article or to pay the fee for securing registration of copyright; . . ." (R. 14.)

It is thus apparent that respondents acted in good faith when they purchased from the author and utilized the material in question.

Where it is admitted that the deposit was not made promptly, a strict application of the statute obviously requires that the copyright claimant be forever barred from maintaining an action for infringement of that particular copyright. If copies were not deposited promptly after publication the opportunity to comply with the requirement of promptness was gone forever as to that particular work.

The appellate court herein aptly stated (R. 41):

> "The reasons for promptness of deposit are present today in even greater measure than in earlier years. The liberalizing of the requirement should not be so construed as to defeat its purpose.[9] Appellee's [petitioner's] failure to comply with the Act in the present case, coupled with discontinuance of publication of its magazine and apparent abandonment of its copyright, produced just such a result as Section 12 was designed to prevent."

Petitioner contends (Supp. brief, p. 4) that the omission of the word "promptly" in the last part of Section 12 relating to the maintenance of an action for infringement is evidence that it does not apply. This overlooks the fact that Section 12 withholds any right of action "until the provisions of this act *with respect to the deposit of copies* and

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[9] House Committee Report No. 2222, 60th Cong., 2d Sess., on the bill which became the Copyright Act of 1909 shows an intention to remedy the hardship of the then existing law providing that no person should be entitled to a copyright unless two copies of the work were deposited not later than the day of publication. The Report called attention to the fact that many copyrights had been lost because, through accident or mistake, the deposit requirement had not been met. Therefore, the Report favored the proposed bill requiring that two copies of any work should be "promptly" deposited. Petitioner lays great stress upon this Report. (Supp. brief, pp. 4-5.)

registration of such work shall have been complied with." The only deposit previously mentioned relative to copyright under Section 9 is the *prompt* deposit specified in the first part of Section 12. Obviously, then, the provision as to prompt deposit must be the one to which reference is made.

Petitioner also contends that the decision of the appellate court herein "renders the penalty of voidance of copyright provided by Section 13 [10] but a hollow threat" because "By the time the penalty becomes applicable it is no longer possible to promptly deposit copies" and, "As an unenforceable copyright is obviously worthless, the voidance thereof would be an idle gesture." This contention is based upon an entirely erroneous impression as to the purpose not only of Section 13 but also of the organic change wrought in the copyright law by the Act of 1909.

Section 13 provides that, if copies be not promptly deposited as required by Section 12, a fine may be imposed and the copyright shall become void. But this is contingent upon the failure of the copyright claimant to meet the demand of the Register of Copyrights for the deposit of copies—a demand which the Register is *not required,* but *only authorized,* to make. The Register has no means of

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[10] Section 13 (35 Stat. 1078, 17 U. S. C. § 13) provides: "That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

knowing when copies should be deposited because, unless he is advised by an interested party or learns by his own observation, he does not know when a notice of copyright has been published. After he finds that there has been a failure on the part of the copyright claimant to deposit copies, the latter is subject to no *mandatory* penalty under Section 13 but only to a demand which the Register *may* make upon him to furnish copies. Of course, if he fail to heed the demand, he subjects himself to the possibility of a fine and to having his copyright become void.

As a practical matter, Section 13 is primarily intended to influence copyright claimants outside the country—persons who might be more inclined to deposit the required copies upon threat of the loss of the copyright than upon threat of a fine. Actually, as aforesaid, the probability, or even possibility, of a proceeding under Section 13 is more fiction than fact because of the liklihood that the Register will never know of the notice of copyright. Section 12 holds the real key to the situation, as seen in the instant case. Deposit was here made 14 months late, and then not as a result of a demand but because the petitioner wanted to bring suit. It is quite evident that otherwise copies would not have been deposited to this day.

It is significant that Section 13 is primarily designed to enrich the Library of Congress. Even the fine suggested is to be accompanied by the payment of "twice the amount of the retail price of the best edition of the work." *Registration is not mentioned.* The Library of Congress is not interested in the registration of a claim to copyright, but only in copies of the work covered by the claim. Authors, publishers, and the general public, on the other hand, are definitely interested in registration. As stated in *Koppel* v. *Downing,* 11 App. D. C. 93, 104:

> ". . . The law of copyright, while securing a long continued monopoly, contemplates, and the *policy of*

> *it requires* that the *public should have notice,* by a true and correct *official registry,* as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public. . . ." (Emphasis supplied.)

Only by means of such an official registry is it possible to learn authoritatively the identity of the copyright claimant, and so be in a position to ascertain the extent of the copyright, that is, whether it is exclusive, or whether certain rights, such as second serial rights, are reserved to the author. In the latter case, it would be important to ascertain the true name of the author, especially if a pen name were used, as here.

In this case petitioner made no effort promptly to deposit copies of the December, 1931, issue of its magazine or to obtain registration of its claim to copyright thereof but waited until 14 months after publication. At the same time it also deposited copies and obtained registration of its claim to copyright of all the other 11 monthly issues which had appeared in 1931. (R. 28.) The obvious reason for depositing copies when it did, on February 21, 1933, was to try to acquire the right to maintain this action which it filed on March 8, 1933. (R. 1, 28.) In fact, petitioner ceased publication of its magazine after the December, 1931, issue. (R. 28.)

Counsel have been able to find only one case wherein the requirement of prompt deposit in Section 12 was before a court. That is the case of *Ebeling and Reuss, Inc.* v. *Raff, Collector, and Wright, Tyndale & Van Roden, Inc.,* 28 U. S. P. Q. 366, decided by the District Court for the Eastern District of Pennsylvania and cited by the appellate court herein. (R. 42.) The Pennsylvania court stated (p. 368):

> ". . . We merely hold that the neglect to observe the statutory requirements referred to, 'promptly', (such is the peremptory word of Section 12), was fatal

> to the right of Wright, Tyndale & Van Roden, Inc., to inaugurate the 'action or proceeding' . . ."

This quotation is significant, not alone because of the holding that failure to deposit promptly is *fatal*, but also because Section 12 is specifically mentioned. Counsel for petitioner insist that the Pennsylvania court was in no way concerned with prompt deposit of copies. They also insist that the appellate court herein "in no way referred to the case". (Supp. Brief, p. 8.)

The petitioner, by failing promptly to deposit copies of its December, 1931, issue, was precluded from maintaining this, or any other, action for infringement of copyright covering material contained therein.

Point 3. If the petitioner be not forever barred, by its failure promptly to deposit copies and secure registration of the work, from maintaining an action for infringement, it is at least barred from suing for any infringement occurring before it registered its claim and deposited its copies.

The petitioner contends that the requirement of Section 12 that copies be deposited promptly has nothing whatsoever to do with the maintenance of an action for infringement but only with the demand which the Register of Copyrights is authorized to make under Section 13. Even though this were true the petitioner cannot prevail because the act of infringement in question occurred long before any effort was made to deposit copies and obtain registration. As stated by the appellate court herein (R. 42):

> ". . . the purpose of the law was clearly not to give retroactive effect to a grossly tardy compliance and thus to establish *ab initio* appellee's [petitioner's] right to maintain an action against one who in the interim had acted adversely to its interest. . . ."

Analogies are frequently drawn between copyrights and patents.[11] In the present case the position of the respondents, under the most generous construction of Section 12, is closely analogous to that of a person to whom is available the defense of intervening rights in a suit involving the infringement of a reissue patent. Petitioner erroneously states (Supp. brief, p. 17) that in the case of *Caliga* v. *Inter-Ocean Newspaper Company,* 215 U. S. 182, "it is held (p. 189) that reissue of patents is not applicable to copyright." The proceeding was for the infringement of a copyright of a painting. The copyright proprietor had attempted to take out a new copyright for the same painting after making slight changes in the title and description. The Court stated that "under the patent law it has been held that there is no authority for double patenting" and "We think the same principle, in this aspect, controls [here], as in the case of a patent. The plaintiff had already exhausted his statutory right and the second attempt availed him nothing." It is thus seen that the case has nothing whatsoever to do with *reissue* patents. However, it does add to the analogies already cited between copyrights and patents.

Whenever a patent is wholly or partially inoperative or invalid by reason of a defective or insufficient specification, or by reason of the patentee claiming as his invention more

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[11] As between themselves, the respective rights of co-owners of copyrights have been held to be analogous to those of co-owners of patent rights. *Carter* v. *Bailey,* 64 Me. 458, 18 Am. Rep. 273. Analogies between patent infringements and copyright infringements have also been drawn by some courts in arriving at the proper amount of damages. *Callaghan* v. *Myers,* 128 U. S. 617, 32 L. ed. 547. Analogies have likewise been drawn between patents and copyrights in regard to the question of taxation. *People* v. *Roberts,* 159 N. Y. 70, 53 N. E. 685. It has also been held that the loss of authorship by publication is analogous to the loss of rights of invention by the sale of a machine which might have been patented. *Wheaton* v. *Peters,* 8 Pet. 591, 8 L. ed. 1055.

than he had a right to claim as new, and if the error arose by inadvertence, accident, or mistake, and without fraudulent intent, the issued patent may be surrendered and a new patent for the same invention, in correct form, be reissued to the patentee. R. S. § 4916, 35 U. S. C. § 64. Under such circumstances, the courts have held that a person who, between the date of the original issue and the date of an application for a reissue, makes or sells an article or uses a process which is broader than the original grant but is included in the application for reissue, acquires an intervening right as against the patentee. *Ashland Fire Brick Co.* v. *General Refractories Co.* (6th Cir.), 27 F. (2d) 744, 746, cert. dismissed, 278 U. S. 662; *Krauth* v. *Autographic Register Co.* (D. C. N. J.), 285 Fed. 199, reversed on other grounds, 3rd Cir., 286 Fed. 470; *Supreme Mfg. Corp.* v. *Security Mfg. Co.* (9th Cir.), 299 Fed. 65, cert. denied, 266 U. S. 614. (Opinion of appellate court herein, R. 42.)

As in the case of a reissue patent, so here, the required initial step was taken. The inventor makes application for a patent; the proprietor publishes notice of copyright. Intervening rights may arise in the one case because the inventor fails to place his specifications and/or claims in proper form to give him the protection to which his invention entitles him, and, in the other case, because the proprietor fails to comply with the requirements of the Copyright Act in order to qualify to maintain a suit for infringement. Until the proprietor complies, he can no more successfully sue than can the inventor successfully sue for an infringement based upon specifications and/or claims which *might* properly have been made, but which were omitted and, therefore, required a reissue patent to cover them. Until the required statutory steps are taken, neither the inventor nor the proprietor may challenge the assumption to which his failure gives rise, namely, that potential rights were abandoned and the matter dedicated to the public, and, until this assumption is rebutted, any acts which might have been actionable if the required statutory

steps had been taken give to the performers thereof intervening rights in the form of a license which can only be terminated by the filing of an adequate application for a reissue patent by the inventor, and the deposit of copies and application for registration of claim of copyright by the proprietor.

In the present case the first alleged infringing act was the publication of certain material eight months *after* petitioner's publication of notice of copyright, and six months *before* registration and the deposit of copies, while the last alleged infringing act occurred two months before registration and deposit by petitioner. Publication by respondents of the said material *after* petitioner's deposit of copies and registration of claim of copyright might be said to constitute an actionable infringement, if such publication had occurred, but petitioner is clearly estopped to deny the right of respondents to their said publication during the period of the petitioner's failure properly to protect itself by registration and deposit of copies as required by the Act.

There is also a practical reason for this construction that becomes obvious from a consideration of the contrary interpretation which, apparently, the petitioner urges, namely, that a copyright claimant may sue for infringement occurring any time after publication, and within the 28-year copyright period, provided copies are deposited and registration completed before suit is instituted. Under such a construction a publisher of a daily newspaper could include a copyright notice in each issue of his paper but decide that, instead of depositing copies and paying the two-dollar registration fee,[12] all of which would exceed $700 per year, he

[12] Section 61 of the Copyright Act (45 Stat. 714, 17 U. S. C. § 61) provides "That the register of copyrights shall receive, and the persons to whom the services designated are rendered shall pay, the following fees: For the registration of any work subject to copyright, deposited under the provisions of this Act, $2, which sum is to include a certificate of registration under seal: . . ."

would merely wait and see if any financially responsible party utilized material contained in any one of the issues and, if so, he would proceed to deposit copies of the issue in question, register his claim, and then institute proceedings, even though the issue in question had appeared 25 years previously and the newspaper had been out of existence more than 20 years. He would only be required to bring suit within a reasonable time so as to avoid the defense of laches. *D. O. Haynes & Co.* v. *Druggists' Circular,* 32 F. (2d) 215. Surely, no court would countenance a proceeding under such circumstances, but under this construction of the statute it would be perfectly proper. There is no middle ground.

The present Copyright Act, unlike its predecessors, specifies no period within which deposit and registration must occur, but merely requires that copies be deposited *promptly.* But under petitioner's theory it makes no difference whether they are deposited one year or 27 years later, as long as they are deposited, and registration obtained, before suit is filed. The word "promptly" in Section 12 is not only meaningless but, in practice, according to petitioner, there is added a clause stating that deposit and registration do not create but merely perfect the right to sue. Needless to say, this may not be done.

It is, therefore, submitted that even the most charitable construction of Section 12 withholds the protection afforded by the remedial provisions of the Act until copies are deposited, unless they are promptly deposited after publication, and precludes suit for alleged infringements occurring during any unnecessary delay of the copyright claimant in complying with the provisions of the Act requiring registration and prompt deposit of copies.

Point 4. The decision herein is not in conflict with that rendered by any other court in the United States or England.

Counsel for petitioner rely upon the case of *Lumière* v. *Pathé Exchange,* 275 Fed. 428. However, the facts make it

wholly inapplicable, and the only reference to prompt deposit is based upon *obiter dictum*. The only question involved is that of a proper *registration* of copyright, the registration which was first secured having been inadequate for the purpose intended.

The copyright in question was that of a photograph. Under the law it was necessary promptly to deposit one copy if the article were not to be reproduced for sale and two copies if it were. Inasmuch as sale was contemplated, two copies of the photograph were promptly deposited as required by Section 12. However, the application for registration, which was essential to the creation of the right to maintain an action for infringement in any case, apparently did not give the date of publication as required in cases where sale is contemplated. Therefore, the date was omitted in the certificate of registration, which was authorized by Section 55 (37 Stat. 724, 17 U. S. C. § 55) and which "shall be admitted in any court as prima facie evidence of the facts stated therein." Accordingly, the registration was only good for photographs not to be reproduced for sale. The District Court dismissed the bill without prejudice to the right of the plaintiff to institute another action after he had secured a proper certificate of registration. Both parties appealed, each contending that a decree should have been entered on the merits in his favor. The Circuit Court of Appeals for the Second Circuit affirmed the action of the District Court.

There was *no question concerning the deposit of copies*, promptly or otherwise. There had been full compliance with the statute in this regard. In fact there had also been registration of the copyright, all necessary information having been given with the exception of the date of publication. The fundamental requirement of the law, as expressed in *Koppel* v. *Downing*, supra, had thus been met. The only question involved was the *incompleteness of the registration*—the omission of the date of publication.

The appellate court considered the *Lumière* case and concluded (R. 41-42) that it—

> ". . . did not decide the question of the present case. The Court in that case expressly avoided consideration of 'Other important and difficult questions depending upon the construction of the Copyright Act . . .' And in his concurring opinion, Hough, J., said:
>
> > 'I agree with the foregoing opinion *as far as it goes*. There are, however, two points for which this decision will by inference be thought authority and as to which I do not wish to be concluded. They are: (1) . . . and (2) whether in any form of action plaintiff can recover damages for infringements committed *before he* not only registered his claim of copyright but *deposited the requisite number of copies.*' (Italics supplied.)
>
> "Judge Hough's second reserved point is the one with which we are concerned."

Counsel for petitioner also rely upon the construction which the English Courts place "upon the corresponding provisions of the English Copyright Law", and they quote Section 24 of the *Literary Copyright Act*, 1842, 5 and 6 Victoria, c. 45. (Supp. Brief, p. 9.) That Act provided only a means whereby the proprietor of a copyright could make entry in a registry book of the title of the copyrighted work, the date of publication, the name and residence of the publisher, and the name and residence of the proprietor. *There was no requirement as to the deposit of copies, promptly or otherwise.* Section 24 provided that no proprietor of a copyright could maintain a suit for infringement—

> ". . . *unless* he shall before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry of the Stationers' Company, of

such book pursuant to this act: Provided always, that the omission to make such entry, shall not *affect* the copyright in any book, but *only the right to sue* or proceed in respect of the infringement thereof as aforesaid; . . ." (Emphasis supplied.)

This provision was discussed in the opinion of Mellor, J., in the case of *Goubaud* v. *Wallace*, 36 Law Times (New Series, 1877) 704, 705, 25 W. R. 604, cited by petitioner, wherein the following statement appears:

". . . the registration of copyright is merely a condition precedent to the bringing an action for infringement, and not to the existence of the copyright itself. Registration, in fact, is necessary only to *perfect the right to sue, not to create it.*" (Emphasis supplied.)

It is thus seen that registration does not create the right to sue but is merely a condition precedent to the exercise of that right.

That registration may, and usually does, take place *at any time prior to the commencement of suit* under the English act is definitely stated by Lord North in *Cate* v. *Devon and Exeter Constitutional Newspaper Company* (1889), L. R. 40 Ch. D. 500, 506, 37 W. R. 487, also cited by petitioner:

". . . It is well known that registration is only necessary as a condition precedent to suing; and the almost universal practice on the part of large publishers notoriously is that they do not register until just on the eve of taking some proceeding; then they take care to register their copyright, and sue upon it. . . ."

This statement of Lord North is in marked contrast with the observation of the New York District Court in *Mittenthal* v. *Berlin*, 291 Fed. 714, also cited by petitioner:

". . . What usually happens is that when a work is printed the publisher wishes to get it to the public as soon as possible. *He may safely do so, if he sees to it*

that two copies go along to Washington with reasonable dispatch . . ." (Emphasis supplied.)

The question involved was whether a deposit *before* publication, instead of promptly thereafter, was a sufficient compliance to support a suit for infringement. The court held that it was and, as seen in the foregoing quotation, it recognized that the deposit of copies "with reasonable dispatch" is essential to establish the right to protect the copyright.

IV

CONCLUSION

The Copyright Act of 1909 simplifies the procedure for securing a copyright of a published work, but divorces therefrom the procedure whereby the right to maintain an action thereon is obtained. The petitioner secured a copyright but failed to take the necessary statutory steps to place itself in a position to vindicate its ownership of that copyright by suit against respondents or anyone else acting in a manner allegedly adverse to its interests within a period of fourteen months after publication.

The appellate court properly held that the purpose of the law is not to give retroactive effect to grossly tardy compliance with its provisions. Therefore, the judgment reversing the District Court should be affirmed.

Respectfully submitted,

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November 15, 1938.

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IN THE

Supreme Court of the United States

October Term, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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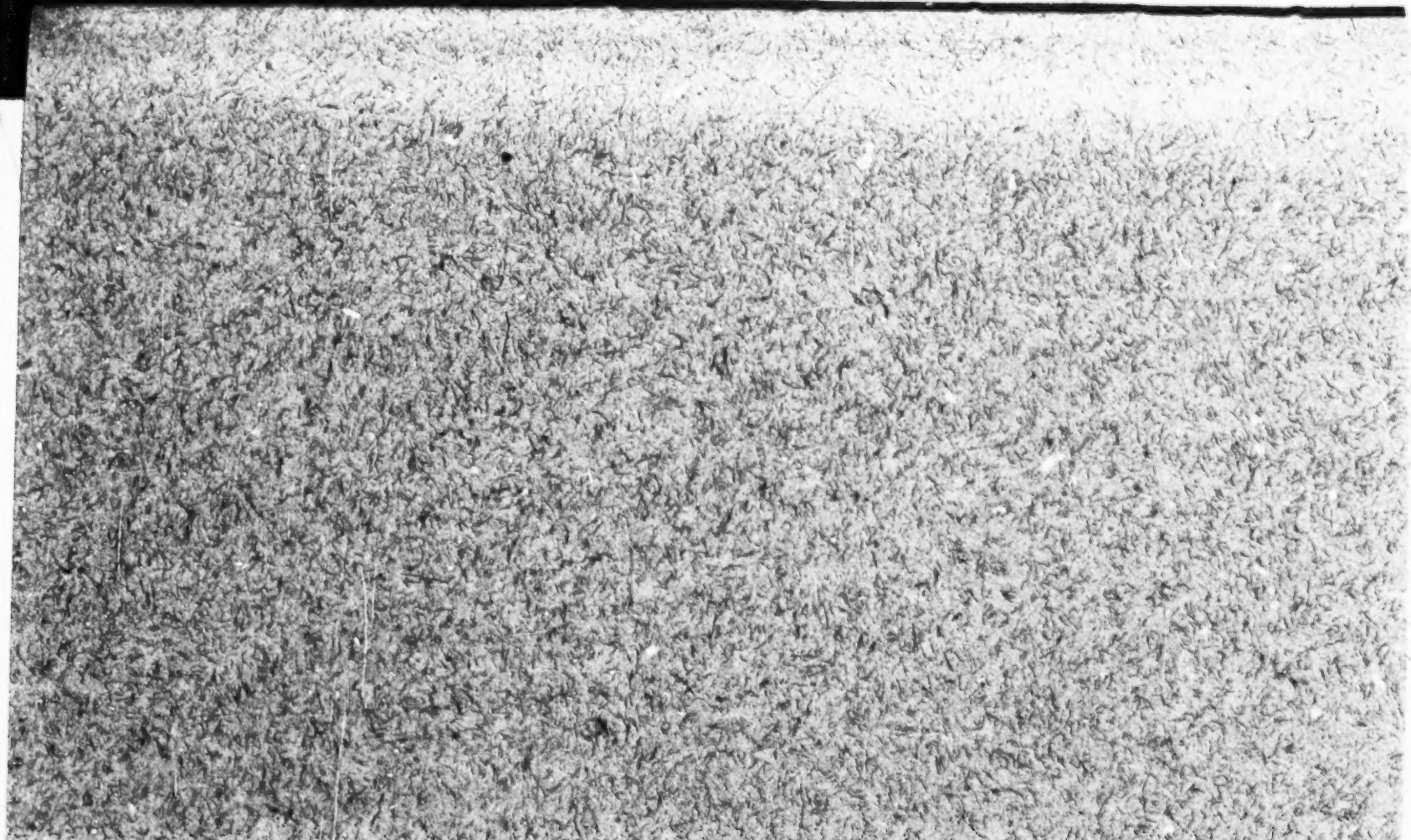

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RESPONDENTS' SUPPLEMENTAL BRIEF

This brief is filed pursuant to leave granted by the Court during oral argument of the cause.

I

Respondents contend that registration must be obtained at the same time that copies are deposited.

On page 7 of their reply brief, counsel for petitioner state that "The principal error in this new position of the respondents is that the copyright law *does not require registration* at any time during the life of the copyright." This is not true. The copyright law *does require registration,* and requires it at the same time as the deposit of copies. Counsel's conclusion is apparently the result of the error

manifested in the following statement also appearing on page 7 of their reply brief:

> "In this connection, the assertion in note 3, page 7, of the respondents' brief, that a 'claim of copyright is an application for registration' and 'not the notice of copyright,' is incorrect. A reading of Section 12 as a whole, from which section the respondents quote in part (Respdts' Brief, p. 7) discloses that the phrase 'claim of copyright,' as used therein, clearly refers to the notice of claim of copyright appearing on the publication."

The correctness of respondents' assertion that a "claim of copyright" is an application for registration is readily seen from an examination of Sections 11 and 12. Section 11 provides for copyright of *unpublished* works "by the deposit, *with claim of copyright*, of one complete copy of such work if it be a lecture or similar production, or a dramatic, musical, or dramatico-musical composition", etc. (Various other evidences of the work are required in other cases.) The important point, for this discussion, is that *no notice of copyright is required.* The copyright and the right to sue for infringement thereof are created at one and the same time, whereas, in the case of a *published* work, copyright is first secured under Section 9 by publication with notice of copyright, and then the right to sue is established by depositing copies under Section 12, *accompanied by a claim of copyright.* As a matter of fact, Section 12 reaffirms the requirement of Section 11 as to unpublished works at the same time that it requires the deposit of "two complete copies" of a published work, the language of the Section being:

> ". . . or if the work is not reproduced in copies for sale, there shall be deposited the copy, print, photograph, or other identifying reproduction *provided by section 11* of this Act, such copies or copy, print, photograph, or other reproduction *to be accompanied in each*

case by a claim of copyright. . . ." (Emphasis supplied.)

The phrase "claim of copyright" is used in connection with the deposit in each case, although where the work is not reproduced in copies for sale there is no notice of copyright. Therefore, it cannot possibly refer to such notice, as petitioner contends.

The Copyright Office, in its Rules and Regulations, has recognized this inevitable meaning of a "claim of copyright" as used in Sections 11 and 12. Rule 22 (17 U. S. C. A. following Sec. 53, pp. 180, 183) contains the following statement in connection with unpublished works:

> "In each case the deposited article must be accompanied by *a claim of copyright* (*an application for registration*) and a money order for the amount of the statutory fee." (Emphasis supplied.)

Rule 23 provides that—

> "Any work which has been registered under Section 11, if published, i. e., reproduced in copies for sale or distribution, must be deposited a second time (*accompanied by an application for registration* and the statutory fee) in the same manner as is required in the case of works published in the first place." (Emphasis supplied.)

Rule 24 states:

> "Promptly after first publication of the work with the copyright notice inscribed, two complete copies of the best edition of the work then published must be sent to the Copyright Office, *with a proper application for registration* correctly filled out and a money order for the amount of the legal fee." (Emphasis supplied.)

Further evidence of the correctness of respondents' assertion that the "claim of copyright" which must accom-

pany every deposit is an application for registration is found in Sections 54 and 55. Section 54 requires the Register of Copyrights, whenever a copy of a work has been deposited, to "*make entry thereof*" in "such record books in the Copyright Office as are required to carry out the provisions of this Act". This is only possible if the deposit be accompanied, as required both by Section 11 and Section 12, by a "claim of copyright" in the form of an application for registration, because Section 55 provides that "in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration" containing various facts which could not possibly be secured from an examination of the copy deposited, such as the address of the claimant, the nationality of the author, date of publication if the work has been reproduced for sale, the fact, in the case of a book, of the receipt of the affidavit as to American manufacture, and the date of completion of printing or the date of the publication.

Registration is thus seen to be definitely associated with deposit of copies and, as will hereafter more fully appear, is of primary importance to effectuate the purposes of the Copyright Act.

II

Respondents agree that the Copyright Act should be construed so as to give effect to all of its provisions.

Counsel for petitioner devote the first four pages of their reply brief to the construction of the Copyright Act and stress the necessity for considering and giving effect to all of the sections. They also contend (Supp. Brief, pp. 17-18, Reply Brief, p. 6) that publication with notice of copyright bestowed upon the petitioner the exclusive right to use and publish the work for a period of 28 years. However, no mention is made of the very first section of the Copyright Act stating who shall have the *exclusive* privilege to print,

publish, vend, and do the other things enumerated. That section states:

> "Any person entitled thereto, *upon complying with the provisions of this Act,* shall have the exclusive right:". (Emphasis supplied.)

It is thus apparent that *all* of the provisions of the Act are important.

In the present case all that the petitioner had done at the time of the infringement, and for six months thereafter, was publish with notice of copyright. But that was only one of the requirements. In order to secure the exclusive right of publication—a right which, as petitioner states, could only be enjoyed if accompanied by the right to sue, it was necessary, under Section 1 and the established law on the subject, to comply with all of the provisions. Two remained, namely, deposit of copies and registration. According to Section 12, there existed no right whatsoever to sue until those requirements were met.

Attention has already been called to Sections 54 and 55 with the requirement of "entry" of copyright and the data to be secured from such entry and included in a certificate of registration. There then follows Section 56 with the requirement—

> "That the register of copyrights shall fully index all copyright registrations and assignments and *shall print at periodic intervals a catalogue* of the titles of articles deposited and registered for copyright, together with suitable indexes, and *at stated intervals shall print complete and indexed catalogues for each class of copyright entries,* and may thereupon, if expedient, destroy the original manuscript catalogue cards containing the titles included in such printed volumes and representing the entries made during such intervals. The current catalogues of copyright entries and the index volumes herein provided for shall be admitted in any court as prima facie evidence of the facts stated therein as regards copyright registration." (Emphasis supplied.)

Section 57 provides for the distribution and public sale of the catalogues.

The entries in the record books of the Copyright Office, and the catalogues of such entries, are obviously intended to represent a complete list of copyrighted works. However, this purpose would not be accomplished under petitioner's contention that deposit and registration may take place *any* time prior to the institution of suit for infringement. Copies of *published* works, together with the application for registration and the statutory fee, would never be deposited unless an infringement occurred and suit was to be instituted, or unless a demand was made by the Register of Copyrights under Section 13, because very few persons would go to the trouble of depositing copies and to the expense of registration if it were not absolutely necessary in order to secure the exclusive right to print, publish, etc. This would mean a negligible number of deposits and registrations of *published* works because there are comparatively few suits for infringement and even fewer demands by the Register of Copyrights. The latter has no means of knowing when a deposit should be made except by actual examination of new publications to determine whether they carry a notice of copyright, or by advice from interested parties. That is obviously the reason Section 13 merely authorizes, and does not require, the Register to demand deposit.

The net result of such a situation would be that, with minor exceptions, only *un*published works would be deposited and registered. They would still come in because statutory copyright of such works can only be secured by deposit and registration under Section 11, there being no notice required as in the case of a published work under Section 9. But an official record, with the ensuing catalogue required by Section 56, would be of doubtful value if it were practically limited to *un*published works, and certainly it would not be the official registry of information to which the public is entitled under the Copyright Act. Thus, one of the main purposes of the Act would be defeated.

Such a situation would have still another effect. The Copyright Office, which is now self-supported * by the registration fees required by Section 61, would be deprived of a large amount of revenue which the Act contemplates it should receive from the persons who are the beneficiaries of the statutory privileges.

It is therefore apparent that petitioner's contention that deposit and registration may take place any time prior to the institution of suit not only fails to give effect to important sections of the statute but it would actually *encourage* non-compliance with the provisions applicable to published works unless and until an infringement occurs and suit is contemplated.

III

The interpretation of the prompt deposit requirement.

During the course of the argument, the Court manifested particular interest in the meaning of the word "promptly" in Section 12 and in the widely divergent contentions of the

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* The annual reports of the Register of Copyrights show that the Copyright Office has, since its organization in 1897, earned more in fees than it has expended. The last published annual report shows that the following fees were earned for the fiscal year ending June 30, 1937 (pp. 1-2):

Registration of	112,510	*published works* ($2 each)	$225,020.00
Registration of	31,874	unpublished works ($1 each)	31,874.00
Registration of	1,451	photographs without certificates ($1 each)	1,451.00
Registration of	8,589	renewals ($1 each)	8,589.00
Miscellaneous			13,607.40
Total registrations	154,424	*Total fees*	$280,541.40

For the same period the *total expenditures* were $251,748.47

It is to be noted that the registrations of *published* works numbered 112,510, or *more than 72% of the total registrations*, and that the same source produced $225,020 in fees, or *more than 80% of the total revenue.*

parties. The petitioner contends that the use of the word is meaningless except as to Section 13, wherein it is repeated. Obviously, if the Congress had not intended that it apply to the provisions of Section 12, it would not have used the word therein.

The contention upon which the respondents chiefly rely in connection with the word "promptly" is that such deposit, accompanied by registration, is necessary in order to enjoy full and complete protection of the copyright from the time it is secured and that, failing in this, any infringements which take place prior to tardy deposit and registration may not be the subject of suit. However, although this construction presents no difficulty insofar as the present case is concerned, it might well be a cause for argument if there were a contest as to whether a particular deposit had been made promptly. In order to obviate any such situation, it is suggested that the word "promptly" may well be construed as a warning that, inasmuch as there can be no exclusive right to make use of the copyrighted material, including the right to sue in the case of infringement thereof, until after full compliance with the statute, there must be a prompt deposit, accompanied by registration, in order to avoid an interval during which any infringement could not become the subject of suit. It is suggested that such an interpretation would work no hardship upon the diligent copyright proprietor but would operate to the detriment only of those who delay either through carelessness or through a desire to save the expense incident to registration.

IV

This case is unique.

Despite the several copyright cases cited by petitioner, as well as the one to which respondents refer, in connection with the prompt deposit requirement of Section 12, the instant case is actually *unique*. No other case involves the

question of *infringement before deposit of copies and registration,* regardless of whether the deposit is prompt or tardy. Therefore, the Court need only be concerned with its own copyright decisions, which unanimously hold that *all* of the conditions of the copyright law are important and must be performed, and that the rights of a copyright owner depend entirely upon whether he has in fact complied with the terms of the statute.

V

Summary.

The petitioner did not secure an exclusive right to print, publish, vend, and otherwise make use of the article in question until *after it complied with the provisions of the Copyright Act.* Only after full compliance did there exist the right to insure that exclusiveness—the right to sue for any infringement. By its failure promptly to deposit copies and secure registration as required by the Act it was, as found by the appellate court, barred from suing for any infringement, such as that here involved, which occurred *before* its tardy deposit and registration.

Respectfully submitted,

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Washington, D. C.

December 9, 1938.

[redacted]

October Term, 1938.

No. 515.

[redacted]

The Washington, Portland Gas Company, [redacted],

Petitioner,

v.

Dora Pickens, Hazen S. Allen and Van Buren Pickens, [redacted],

Respondents.

PETITION OF THE RESPONDENTS FOR A REHEARING.

Ernest Haycox,
Elliot C. Lawson,
Counsel for Respondents,
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Washington, D. C.

February 21, 1939.

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In The

Supreme Court of the United States

October Term, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC.,
Petitioner,

v.

DREW PEARSON, ROBERT S. ALLEN and VAN REES PRESS, INC.,
Respondents.

PETITION FOR REHEARING

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The respondents, Drew Pearson, Robert S. Allen and Van Rees Press, Inc., pursuant to Rule 33, respectfully petition for a rehearing of the above entitled cause, a decision adverse to them having been rendered on January 30, 1939, Justices Black, Roberts and Reed dissenting, and in support of their petition respondents state:

I.

THE FUNDAMENTAL REASON FOR THIS PETITION.

The majority opinion holds that deposit of copies and registration of the copyright of a work published with the required notice are not necessary to *create* the right to maintain a suit for infringement, but that such a right actually exists *immediately* upon publication with notice, the statutory requirements of deposit and registration being mere formalities with which the copyright proprietor may comply *at any time* before a suit for infringement is instituted.

The majority opinion thus changes the general conception of the copyright law as it affects published works. Although the strict requirements of the statute actually remain the same, it is no longer necessary, as a *practical* matter, to deposit copies and obtain registration of copyright thereof *except* where there has been an infringement and suit is to be instituted in connection therewith, or where demand for copies has been made by the Register of Copyrights. This presents an anomalous situation which was clearly not contemplated by the majority opinion, but which is so real and is fraught with such unfortunate consequences that the respondents consider it their duty to afford an opportunity for a rehearing.

II.

SUMMARY OF REASONS FOR REHEARING.

1. The majority opinion amends the Copyright Act of 1909 by eliminating the incentive for prompt deposit and registration provided by Section 12, and by changing Section 13 to make it impose upon the Register of Copyrights a *duty* to police the entire publication field in order to make it possible for him to comply with other sections of the Act.

2. The majority opinion virtually imposes a penalty for strict compliance with the requirements of the Act concerning deposit of copies and registration of copyright of *published* works. This it does by giving the ultra conscientious copyright proprietor—the proprietor who promptly deposits his copies and pays the registration fee even though no suit for infringement be contemplated and no demand by the Register of Copyrights has been made or is even anticipated—no advantage which is not enjoyed by the copyright proprietor who elects to save the trouble and expense of deposit and registration until infringement proceedings are about to be instituted or until the Register makes demand. Conversely, it visits no disadvantage whatsoever upon the copyright proprietor who ignores the deposit and registration provisions until infringement proceedings are about to be instituted or until the Register makes demand.

3. The majority opinion invites disregard for the copyright law on the part of copyright proprietors of *published* works by assuring them that they need not go to the trouble and expense of depositing copies and registering their copyrights unless and until an infringement proceeding is about to be instituted or the Register makes demand.

4. The majority opinion favors copyright proprietors of *published* works because they are allowed to ignore, with impunity, the deposit and registration provisions, and the trouble and expense incident to compliance therewith, unless an infringement proceeding is about to be instituted or the Register makes demand, whereas proprietors of *un*published works under Section 11 must make deposit and secure registration of copyright before the copyright itself can be obtained.

5. The majority opinion renders of little value the official registry and the catalogues and indexes required by the Act because copyright proprietors of *published* works, whose registrations have, in the past, constituted more than 70% of the total, may be expected to take advantage of the mone-

tary saving afforded by the changed concept of the deposit and registration provisions. As a result the catalogues and indexes thereto published by the Copyright Office will be limited largely to *un*published works and will thus fall far short of presenting a complete registry of copyright works and fulfilling its purpose of supplying such data to collectors of customs and postmasters in accordance with the lists prepared by the Secretary of the Treasury and the Postmaster General under Section 57.

6. The majority opinion shifts to taxpayers in general the burden now carried, as contemplated by the Act, by copyright proprietors. Inasmuch as approximately 80% of the revenue of the Copyright Office is realized from registrations of *published* works, it is obvious that a material decrease in such registrations will result in the operation of the Copyright Office at a substantial loss, rather than at a profit as in the past, and will necessitate an appropriation from the general funds of the United States if the Copyright Office is to continue in existence.

7. The majority opinion fails to take into consideration and give effect to all provisions of the Act. It does not even list, among "Pertinent portions of the statute", Sections *56* (requiring indexing of copyright registrations and printing of catalogues of copyright entries), *57* (providing for *prompt* distribution of the catalogues of copyright entries to collectors of customs and postmasters to prevent importations prohibited by Sections *30* and *31*), and *58* (requiring record books and indexes to be open to public inspection).

8. The *respondents' contention* takes into consideration and gives effect to all provisions of the Act. It gives to the copyright proprietor the *exclusive* right to print, publish, and do the other things enumerated in Section 1 upon his compliance with the deposit and registration provisions. Until such time he has no right to sue for an infringement. So he must deposit and register promptly—without delay—if he wishes to avoid a period during which an infringement may occur for which he cannot sue.

III.

REASONS FOR REHEARING.

1. The Majority Opinion Amends the Copyright Act.

The majority opinion amends the Copyright Act of 1909 by eliminating the incentive for prompt deposit and registration provided by Section 12. This it does by holding that the right to maintain a suit for infringement is created at the same time as the copyright itself—upon publication with the required notice—and that the statutory requirements of prompt deposit and registration are mere formalities with which the copyright proprietor may comply at any time before suit for infringement is instituted. True, the opinion purports to give effect to the word "promptly" as repeated in Section 13, but it is obvious that, as there used, the word is practically meaningless because the sole purpose of that Section is to impose a penalty for failure to deposit copies *after a demand therefor has been made* by the Register of Copyrights. This demand *may* be made "*at any time* after the publication of the work". Even after demand a copyright proprietor living in the United States has *three months* within which to comply.

Inasmuch as the Register of Copyrights has no practical means of knowing who has published with notice of copyright but without depositing copies and obtaining registration, the requirement of promptness may be said to be of no significance in Section 13. Obviously, that is the reason the Register is, by the plain language of the Section, merely given the authority, and is not compelled, to make demand upon the proprietor to deposit copies and obtain registration.

Therefore, the majority opinion makes the Copyright Act of 1909 similar to that in effect in many European countries, although the Congress of the United States has consistently refused to change our law to conform to that of Europe. There a copyright and all of the privileges

pertinent thereto are secured automatically and without any *notice* of copyright. Nor is any deposit necessary or required for any purpose. Under our Act, as *now* interpreted by this Court, deposit and registration are *theoretically required* in all cases, but are only *actually necessary* when suit is contemplated or demand is made for copies.

The majority opinion also amends the Copyright Act by making it mandatory, instead of permissive, for the Register of Copyrights to demand copies of all works published with notice of copyright. This becomes necessary in order to insure the revenue contemplated by the Act for the registration of published works and also to insure the publication of complete catalogues and indexes of copyrighted works as contemplated by Section 56. Prior to the rendition of the majority opinion, the Register of Copyrights could rely upon the requirement of promptness to secure copies and the information incident to registration. However, if the interpretation enunciated by the majority opinion be allowed to stand it will mean that the Register must look to Section 13 not as a convenience in the case of an emergency but as imposing upon him a duty to *police* the entire publication field in an effort to keep himself advised of works published with notice of copyright so that he may examine his records and determine whether or not proper deposit and payment of the registration fee have been made. Even then, the difficulties attending such a duty, and the large field staff which would obviously be necessary, would appear to be such that it would be impossible for the Register to realize the revenue essential to maintaining his office, as in the past, or to publish adequate catalogues. Surely such a result is not contemplated by the Act.

2. The Majority Opinion Virtually Penalizes Those Who Comply with the Law.

Although the exclusive right of a copyright proprietor to print, publish, vend, and do the other things enumer-

ated in Section 1, arises only "upon complying with the provisions of this Act", the majority opinion gives that right, at least potentially, to all persons who have secured a copyright by publication with notice thereof irrespective of deposit and registration. The Act clearly contemplates, and many court decisions have so indicated, that one of its principal purposes is to provide an official registry of copyrights, together with a showing as to when the monopolies were acquired so that all may know when they will end, and Section 56 requires the Register of Copyrights to print at periodic intervals catalogues of copyright entries, together with indexes thereto, which, in the aggregate, are obviously expected to be representative of all existing copyrights. However, the majority opinion makes unnecessary the deposit of copies of published works and payment of the registration fee except when a suit is to be instituted for infringement, or when a demand is made by the Register under Section 13. Thus a copyright proprietor, who complies with the clear requirements of the statute regarding deposit and registration, irrespective of the changes wrought by the majority opinion, actually pays a penalty for such compliance unless a demand has been made for deposit or unless a suit for infringement is to be instituted. The cost of the copies deposited, and the amount of the registration fee, would otherwise be an entirely unnecessary expense.

3. The Majority Opinion Invites Disregard of the Law.

Inasmuch as the majority opinion makes necessary the deposit of copies and registration of published works only when the proprietors of the copyrights thereof are about to sue for infringement or have received a demand from the Register of Copyrights, it would be poor economics for a copyright proprietor of a published work to make deposit and pay the registration fee under any other circumstances. The chances that it will become advisable for him to sue for infringement are comparatively neg-

ligible, as is also the possibility that the Register of Copyrights may learn of his publication with notice and of his failure to deposit. Furthermore, he can lose nothing by waiting to deposit and register after infringement has taken place or after the Register has made demand. True, in the latter case his copyright will become void and he will be liable to a fine *if* he does not make deposit *within three months*, but compliance within that time may hardly be considered a hardship.

Under these circumstances it would be small wonder if publishers who pay hundreds of dollars to the Copyright Office each year for registration of the copyrights of published works should hail the majority opinion as affording a means for large savings at the expense of the general public and without fear of untoward results. Furthermore, as stated in the dissenting opinion of Mr. Justice Black, "it is unreasonable to assume that an owner of a copyright will voluntarily make the extent and limitations of his monopoly more public than the law requires."

4. The Majority Opinion Favors Copyright Proprietors of Published Works.

The requirement of prompt deposit contained in Section 12 and made the subject of reference in Section 13 applies only to *published* works. Section 11 of the Copyright Act provides for the copyright of *un*published works "by the deposit, with claim of copyright, of one complete copy of such work", etc. No notice of copyright is required. The copyright and the right to sue for infringement thereof are created at one and the same time by making deposit and securing registration as required. Therefore, a proprietor of a copyright obtained under Section 11 must have made the required deposit and paid the registration fee before he even became a copyright proprietor.

The copyright proprietor of a *published* work, on the other hand, becomes a copyright proprietor immediately

upon the publication of his work with notice of copyright as required by Section 9 of the Act. The majority opinion states, in effect, that he may enjoy the monopoly thus acquired *without further compliance* with the Act unless he should find it advisable to bring suit for infringement or unless he should receive a demand from the Register of Copyrights. It should be remembered that the demand itself is no reflection upon the copyright proprietor and is practically no burden upon him because it gives him *three months* to deposit copies—to do that which he was originally to have done *promptly*.

Thus, under the interpretation placed upon the Act by the majority opinion, the proprietor of the copyright of a published work must have complied with no requirement of the Act save that regarding publication with notice of copyright, except in the case of suit for infringement or a demand by the Register, whereas the proprietor of the copyright of an *un*published work must have complied with *all* requirements of the statute in the first instance.

5. The Majority Opinion Renders of Little Value the Official Registry and the Catalogues Required by the Act.

Section 54 of the Copyright Act requires the Register of Copyrights, whenever a copy of a work has been deposited, to *"make entry thereof"* in "such record books in the Copyright Office as are required to carry out the provisions of this Act". This is only possible where deposit is made and accompanied, as required both in the case of published and of unpublished works, by a claim of copyright in the form of an application for registration containing various data which Section 55 provides shall appear on the certificate of registration to which every copyright claimant is entitled.

Section 56 provides that the Register of Copyrights "shall fully index all copyright registrations and assignments and shall print at periodic intervals a catalogue of

the titles of articles deposited and registered for copyright, together with suitable indexes, and at stated intervals shall print complete and indexed catalogues for each class of copyright entries".

Section 57 provides for the distribution and public sale of the catalogue. The Copyright Office is required "promptly" to distribute the current catalogues as they are issued "to the collectors of customs of the United States and to the postmasters of all exchange offices of receipt of foreign mails, in accordance with revised lists of such collectors of customs and postmasters prepared by the Secretary of the Treasury and the Postmaster-General, . . ." The purpose of this provision is to acquaint the postmasters and the customs officers with the titles of, and other information concerning, *all* works copyrighted in the United States in order to enable them to prevent the unlawful importation of copies of such works printed in foreign countries.[1]

Section 58 provides that "the record books of the Copyright Office, together with the indexes to such record books,

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[1] Section 30 prohibits the importation of any article bearing a false notice of copyright, or of any piratical copies (actual copies or substantial reproductions) of any work legally copyrighted in the United States. (See Article 543(a) of the 1937 Customs Regulations, Treasury Department, Bureau of Customs.)

Section 31 prohibits the importation of piratical copies of any book during the existence of its American copyright, and, with certain exceptions, of any copies thereof, although authorized by the author or proprietor, which have not been produced in accordance with the manufacturing provisions specified in Section 15.

Section 32 provides for seizure and condemnation of articles imported (except in the mails) in violation of Sections 30 and 31.

Section 33 empowers and requires the Secretary of the Treasury and the Postmaster-General "to make and enforce such joint rules and regulations as shall prevent the importation into the United States in the mails of articles prohibited importation by this Act".

and all works deposited and retained in the Copyright Office, shall be open to public inspection".

The entries in the record books of the Copyright Office, and the catalogues of such entries, together with the indexes thereto, are obviously intended to represent a *complete list* of copyrighted works. Otherwise, they would be of little value to customs officers, postmasters, libraries, and interested private individuals. However, this purpose would not be accomplished under the majority opinion making necessary deposit and registration of published works *only if* suit be contemplated or if demand be made. The result would be that, with minor exceptions, only *un*published works would be deposited and registered. Inasmuch as *published works constitute more than 70%* [2] *of all registrations,* it is readily seen that the omission of a large number of published works from the catalogues would defeat one of the plain purposes of the Act.

6. The Majority Opinion Shifts to Taxpayers in General the Burden Now Carried, As Contemplated by the Act, by Copyright Proprietors.

The Congress contemplated that the persons who are the beneficiaries of the privileges granted by the Copyright Act

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[2] The Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1937, page 2, shows that there were 154,424 registrations. Of these, 112,510 were registrations of published works at $2 each; 31,874 were registrations of unpublished works at $1 each; 1,451 were registrations of photographs, without certificates, at $1 each; and 8,589 were registrations of renewals of all types at $1 each.

The Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1938, page 2, shows that there were 166,248 registrations. Of these, 118,153 were registrations of published works at $2 each; 35,947 were registrations of unpublished works at $1 each; 2,208 were registrations of photographs, without certificates, at $1 each; and 9,940 were registrations of renewals of all types at $1 each.

should bear all, or at least a substantial part, of the cost of its administration. Otherwise, the registration fees required by Section 61 would have been omitted, and the Congress would not have taken the trouble to increase the registration fee of unpublished works from $1 to $2 as it did by the Act of May 23, 1928.[3] As a matter of fact, the annual reports of the Register of Copyrights show that the Copyright Office has, since its organization in 1897, earned more in fees than it has expended. For the fiscal year ending

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[3] The Act of May 23, 1928, 45 Stat. 714, increasing copyright fees is set forth in full on pages 28 and 29 of the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1928. The Committee on Patents, to which the bill (H. R. 6104) was referred, submitted its report (House Report No. 353) unanimously approving the same. This report, which appears in full on Pages 29 to 31 of the said Annual Report of the Register of Copyrights clearly shows that the registration fees should be commensurate with the cost of the service performed by the Copyright Office and that the beneficiaries of the privileges granted by the Copyright Act should pay the expense of its administration. The House Report contains the following significant statements:

> "This bill proposes an increase of the registration fee from $1 to $2 for each registration made, which is to include a certificate of such registration, and a corresponding increase in the subsidiary fees for the recordation of documents, and their comparison, and for searches and for renewals, etc. . . .
>
> " . . . The fees now paid do not cover the actual cost of the service performed, including salaries, supplies, printing of blanks, certificates, and circulars, and of the Catalogue of Copyright Entries, nor the overhead charges of the Copyright Office for space, light, and heat, etc.
>
> "Under all the circumstances the increase in fees proposed by the bill seems reasonable. . . . "

June 30, 1937,[4] 112,510 published works were registered at $2 each, thus bringing to $225,020 the total revenue realized from this source. This amounted to more than 80% of the gross revenue of the Copyright Office. During the fiscal year ending June 30, 1938,[5] 118,153 published works were registered at $2 each, thus making a total revenue of $236,306 from this source alone. If the present decision of the Court had been in effect during the two fiscal years mentioned, it may be conservatively stated that more than 100,000 of those published works which were deposited and registered would never have appeared in the Copyright Office.[6]

Inasmuch as there are relatively few suits for infringement of published works as compared with the more than

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[4] See the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1937, page 2.

[5] See the Annual Report of the Register of Copyrights for the fiscal year ending June 30, 1938, page 2.

[6] It may be of more than passing interest to note the reaction of the well-known publishing business trade magazine, EDITOR & PUBLISHER, toward the interpretation placed upon the Copyright Act by the majority opinion. If the comments of that publication be considered indicative of the attitude of the publishing business, as they may well be, there is no question but that registrations of published works will sharply decline almost immediately. The comments appeared in the February 4, 1939, issue in the form of an editorial entitled "Copyright Anomaly" which states:

> "Trouble looms for publishers in the decision this week by the U. S. Supreme Court on copyright protection. As we read the court's ruling, it seems to mean that *matter on which a publisher claims copyright need not be deposited in the Library of Congress with the reasonable promptness that all have assumed until now was required, nor need a copyright fee be paid at the time of publication.* He publishes his claim with a copyright line at the time of publication, and it appears that the court will sustain his claim against another, who assumed that the absence of copy from the Library of

112,000 registrations per year, it is evident that the fees provided by Section 61 in connection with published works would amount to merely a nominal sum if paid only by those who contemplate infringement proceedings, or who make deposit and secure registration only after demand under Section 13. This is obviously true because, as heretofore stated, there is no way for the Register of Copyrights to learn of a failure to deposit copies except by examining every published work carrying a copyright notice, or through information voluntarily furnished by interested parties. Thus there would be shifted to taxpayers in general the burden now carried, as contemplated by the Act, by copyright proprietors.

7. The Majority Opinion Fails to Take Into Consideration and Give Effect to All Provisions of the Act.

The Court has frequently called attention to the fact that every section and provision of a statute should be interpreted by reference to every other and that one part should not be construed so as to annul or destroy that which has been granted by another, but the construction should be such as to permit all sections to stand together. Deposit of copies and registration of copyright are clearly required by Section 12, and are not merely made obligatory as conditions to the right to sue for infringement or in response

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Congress indicated that the matter was free to all comers.

"We often fail to understand the logic of judicial decision, and we see in this one a chain of legalistic reasoning which defeats the evident intention of the legislature. It destroys the law, because Congress neglected to include a glossary of the statute's key words, and it is the sort of decision which makes work for the shyster lawyer, trouble for the honest publisher, and profits for the crook." (Emphasis supplied.)

to a demand by the Register of Copyrights under Section 13. Further evidence of this fact is found in the provision of Section 56 requiring indexing of copyright registrations and printing of catalogues of copyright entries, in the provision of Section 57 requiring prompt distribution of the catalogues of copyright entries to collectors of customs and to postmasters to prevent importations prohibited by Sections 30 and 31, and in the provisions of Sections 54 and 58 requiring the maintenance of an official registry and that the record books and indexes be kept open for public inspection. As previously stated, the official registry and the catalogues and indexes compiled therefrom are obviously intended to contain information concerning all copyrighted works, not only unpublished works copyrighted under Sec. 11 and published works copyrighted under Section 9 whose proprietors have instituted infringement proceedings or have received a demand from the Register, but also published works copyrighted under Section 9 and never made the subject of infringement proceedings or the object of a demand from the Register. However, if the construction imposed by the majority opinion be permitted to stand, these provisions, which represent a clear intention of the Congress, will be nullified, at least in large part, and the procedure which has been followed by the Copyright Office and accepted by the general public for a period of thirty years will be substantially changed—changed by judicial legislation.

8. The Respondents' Contention Takes into Consideration and Gives Effect to All Provisions of the Act

The majority opinion states:

> ". . . The Act nowhere defines 'promptly' and to make the continued existence of copyright depend upon promptness would lead to unfortunate uncertainty and confusion. . . .

> ". . . Evidently mere delay does not necessarily invalidate the copyright; its existence for three months after actual notice is recognized. Without right of vindication a copyright is valueless. It would be going too far to infer that tardiness alone destroys something valuable both to proprietor and the public."

These statements would indicate that the only contention urged by the respondents was that the failure of the petitioner promptly to deposit copies and secure registration was fatal to its right to bring suit for infringement at any time, no matter when the infringement took place. It would also indicate that the respondents contend that the copyright itself was invalided by tardy deposit.

The respondents have never contended that the petitioner did not secure a valid copyright by publication under Section 9 with the required notice. On the contrary, they have always admitted its validity. But they have contended that the copyright thus secured was a bare right and was not accompanied by the right to sue for an infringement thereof; that the right of suit did not come into existence until copies were deposited and registration obtained. Although it was suggested that the failure promptly to deposit might forever bar a right of action, this contention was not urged by the respondents in the argument before this Court; instead, they urged that a failure promptly to deposit merely afforded a period during which the petitioner was without any right of action and, therefore, could not sue for any infringement occurring during that time.

Under Section 1 of the Act the *exclusive* right to print, publish, vend, and do the other things enumerated, accrues "upon complying with the provisions of this Act". The majority opinion makes no attempt to deny the applicability of Section 1, or that the deposit and registration requirements are "provisions of this Act", but it does give to a copyright proprietor the exclusive right made available by Section 1 even *before there has been compliance with the deposit and registration provisions.*

The majority opinion stresses the failure of the Act to define the word "promptly". However, it is not necessary to have any such definition. The word "promptly", when considered in the light of the entire Act, is nothing more or less than a warning that a copyright proprietor can only secure the maximum protection under the Act by depositing and registering without delay, because he has no exclusive right to print, publish, etc., until *after* he has complied with all applicable provisions.

If Section 12 be so construed, there will be no destruction of the copyright or of the right to sue for infringement, but *the proprietor will secure the right to sue immediately upon complying with the deposit and registration provisions.* Section 13 is not affected in any way, because the Register may still make demand at any time after publication. Because of the fact that the great majority of persons securing a copyright under Section 9 will want to be in a position to sue for an infringement no matter when it will take place, they will be inclined to make deposit and secure registration without delay so that there will be no period when an infringement may take place for which suit will not lie. Thus the Copyright Office will be enabled to keep a complete registry of copyrighted material as it has in the past and as contemplated by the Act, and the catalogues and indexes thereto required by Section 56 will be representative of all copyrighted works, both published and unpublished, and be of maximum value to the collectors of customs, the postmasters, and to the general public. There will be no decrease in the revenue received by the Copyright Office from the registration of published works. All copyright proprietors will be on an equal basis, whether their works are published or unpublished. In short, effect will be given to every section and to every purpose of the Act, and the only loser will be the person who ignores the deposit and registration requirements until after infringement has occurred. This is as it should be and is the construction which the respondents urge upon the Court.

IV.

CONCLUSION.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States Court of Appeals for the District of Columbia be, upon further consideration, affirmed.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Respondents.
729 Fifteenth Street,
Washington, D. C.

February 21, 1939.

CERTIFICATE OF COUNSEL

We, Elisha Hanson and Eliot C. Lovett, counsel for the above named respondents, hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith for the reasons stated and not for the purpose of delay.

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Respondents.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 222.

THE WASHINGTONIAN PUBLISHING COMPANY, INC., *Petitioner*,

v.

DREW PEARSON, ROBERT S. ALLEN, AND VAN REES PRESS, INC., ET AL.

PETITIONER'S REPLY TO GOVERNMENT'S MEMORANDUM.

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER ERWIN ANGLE,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY IN OPPOSITION TO GOVERNMENT'S MEMORANDUM AS AMICUS CURIAE.

The petitioner is of the opinion that all of the contentions raised by the respondents in their petition for a rehearing had been considered and met in previous briefs filed by the petitioner, in the argument of the case and in the Court's opinion herein. In view of the unique memorandum filed by the Solicitor General on behalf of the United States as *amicus curiae* requesting that a rehearing be granted in the case, the petitioner respectfully submits for consideration by this Honorable Court the following reply in opposition to the respondents' petition for a rehearing.

It is noted that the Memorandum for the United States as *amicus curiae* is not an argument based upon any legal errors committed by the Court in its decision, but is predicated apparently upon three letters appearing in the appendix to the memorandum on pages 3 to 9 thereof. These three documents of about the same date contain assertions which have been injected into the case for the first time and are not matters of record. We call the Court's attention to the fact that neither the Registrar of Copyrights nor the Librarian of Congress have changed their position from that taken in the letter of the Registrar of Copyrights to the Librarian of Congress, dated September 17, 1938, which was referred to by the Court in its opinion on page 8. We do not deem it proper to answer the assertions in the Government's memorandum, including the letters appended thereto, but we do undertake to answer the questions of law raised.

The memorandum for the United States was not filed until Friday, March 3, 1939, some six years after the institution of the above entitled suit and 7 days after the expiration of the prescribed period for filing a petition for rehearing. The Government was at all times cognizant of the case and the issues involved therein. A representative of the Copyright Office testified at the trial of the case and a representative of that office was present at the argument of the case before the United States Court of Appeals for the District of Columbia and before this Court. The record, documents and briefs in the case were readily available to the Government, and in fact, all of the petitioner's briefs have been submitted to the Copyright Office. On several occasions counsel for the petitioner discussed the case with officials of the Copyright Office and suggested that that office file a brief in the case as *amicus curiae*, but it preferred not to do so. In this connection it is noted that in the letter from the Registrar of Copyrights to the Librarian of Congress, dated September 17, 1938 (*supra*) which was written *after* the decision by the Court of Appeals on

April 25, 1938, in favor of the respondents and *before* the granting on October 10, 1938, of the application for the writ of certiorari in the case by this Court, the Copyright Office expressed its views on the present question which are in complete accord with the decision of this Court.

REGISTRATION OF COPYRIGHT IS NOT INVOLVED.

The basic fallacy indulged in by the respondents and the Government is that the decision in the case by this Court involves the registration provisions of the Copyright Law. (U. S. C. A., Title 17.) On the contrary the sole question in the case was whether the Copyright Law requires the *prompt* deposit of copies of the work, containing the copyright notice, in the Copyright Office as a prerequisite to the right to maintain an action for the infringement of the copyright obtained under Sections 9 and 18 of the Act. This Court held that it did not.

Registration of copyright is not mandatory under the Copyright Law. Section 10 of the Act (the registration provision) provides merely that a "person *may* obtain registration of his claim to copyright". Nowhere in the Act is registration required, except as a prerequisite to suit. (Sec. 12) The petitioner's reply filed December 16, 1938, to respondents' supplemental brief filed after oral argument, fully covers this point.

THE ALLEGED LOSS TO THE GOVERNMENT IS NOT ONLY PROBLEMATICAL BUT IRRELEVANT.

The Government's memorandum appears to be primarily concerned with an alleged loss of registration fees by the Copyright Office. It is alleged therein that the Library of Congress is likely to be without a large number of desired works. In the latter connection it suffices to point out that the Copyright Law itself in Section 13 sets out in unambigious terms the manner and the right of the Library of Congress to obtain any book published that seeks the protections of the Copyright Laws.

As regards the Government's primary concern the decision of this Court should have no effect upon registration fees for, as hereinbefore pointed out, the decision in this case does not involve the matter of registration of copyright. Moreover, it is not to be supposed that the interpretation of a law should be forced by pecuniary interests of the Government which may be affected thereby.

The registration fee provided by the Act is not to raise revenue but is to defray the cost of registration if and when sought by the copyright owner. Should registrations decrease as predicted by the Government the Copyright Office would be relieved of the corresponding cost of handling such registrations. Furthermore, the Library would be saved the cost of handling and storing the works which it is alleged would not be deposited.[1] In the Government's memorandum are presented *merely* allegations as to a supposititious decrease in registration fees. The financial effect of a decrease in registrations and deposits cannot be even roughly estimated without taking into account the saving which the Copyright Office and the Library of Congress would be able to effectuate as hereinbefore indicated.

It is concluded that the alleged loss predicted by the Government is not only highly problematical but wholly irrelevant.

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[1] Although Sections 59 and 60 of the Copyright law provide for the disposal or destroying of deposited copyrighted works the following quotation from the annual report of the Librarian of Congress for 1938, page 429, is worthy of note: "The activities in connection with the care and maintenance of the building have been normal for the past year except as to crowded conditions due to accumulation of library material. The storage facilities throughout the building have reached their limit and the resulting congestion and constant shifting of material have added considerably to the duties of the labor force."

THE DIFFICULTIES OF ENFORCEMENT OF SECTIONS 30 AND 31 OF THE COPYRIGHT ACT ARE NOT ENHANCED BY THE DECISION OF THE COURT.

The difficulties of enforcement of Sections 30 and 31 of the Copyright Act are not enhanced by the decision of the Court. Section 56 of the Copyright Act relates to the compiling and printing of catalogues of copyright entries and the entries included therein are only those entries (as distinguished from entries of deposit of copies) of works where the owner of the copyright has exercised the option to register conferred upon him in Sections 10 and 55 and has elected to pay the specified fee. Until election has been exercised and registration secured there is no entry to be catalogued. It is presumed, however, that the owner of a copyright would register his copyright if there were any chance of importation of unauthorized editions of his work into this country.

The entry in the catalogue of the various registrations of The Washingtonian magazine as prescribed in Section 56 of the Act, are shown in the margin.[2] There is nothing in the catalogue entry relating to the registration of the De-

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[2] Excerpts from page 106, Catalogue of Copyright Entries, Part II, Vol. 28, 1933:

Washington Post Daily, fol. (c)
Washington Post Co. 8428-8517
No. 20653, (c) Jan. 1, 1933 (B175803)
to No. 20715. (c) Mar. 31 (B18840

Washingtonian (The) (c) Mayflower
log corp. 8518-8522
V. 6, 1931, Nos. 10-12.
Jan. (c) Jan. 10; B181706.
. . . . . .

(c) Washingtonian pub. co., inc;
8523-8529
V. 7, 1931, Nos 3-9
June. (c) June 10; B181711
. . . . . .
Dec. (c) Dec. 10; B181717

Watertown. (c) Chicago bridge & iron
. . . . . .

cember 1931 issue of the magazine, The Washingtonian, that would give the Treasury Department any information at all about the article, "The Mills of the Gods," admittedly pirated by the respondents.

Sections 30 and 31 of the Copyright Laws prohibit the importation into this country of any piratical copies of copyrighted works whether they be either registered or deposited or neither. The catalogues of copyright entries may be one source of information to aid in the enforcement of these sections, but they are not the sole basis of action by the Government. It may be assumed that a copyright owner, alive to his rights, would promptly report any violation of the law by importation affecting his copyright.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the respondents' petition for rehearing be denied.

Respectfully submitted,

GIBBS L. BAKER,
HORACE S. WHITMAN,
LUTHER EWIN ANGLE,
Counsel for Petitioner.

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 222

THE WASHINGTONIAN PUBLISHING COMPANY, INC., PETITIONER

v.

DREW PEARSON, ROBERT S. ALLEN, AND VAN REES PRESS, INC.

ON PETITION FOR REHEARING

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The Solicitor General, on behalf of the United States, submits this memorandum as *amicus curiae* in support of the petition for rehearing in the above-entitled cause.

The interests of the United States which are affected by the decision herein are indicated in communications received from the Secretary of the Treasury, the Chairman of the Joint Committee on the Library, and the Chairman of the Committee on the Library of the House of Representatives, a copy of each of which is appended hereto.

These communications disclose that as a result of the construction of the Copyright Law adopted in the present decision, the Copyright Division of

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the Library of Congress is likely to lose substantial revenues; the Library is likely to be without a large number of published works which should be deposited in the Copyright Division; and the Treasury Department is likely to be impeded in the enforcement of the prohibition contained in Sections 30 and 31 of the Copyright Law against the importation of piratical copies of copyrighted works, since the Treasury Department necessarily relies upon the catalogue of copyright entries furnished by the copyright office pursuant to Section 57 of the Copyright Law.

These practical consequences would appear to be of significance in determining the intention of Congress with respect to the prompt deposit of works published with notice of copyright. These consequences suggest that the requirement of Section 12 that two copies of the work be "promptly deposited" was intended to be mandatory and to be accompanied by an effective sanction, and that this sanction is to be found in the provision of the same section precluding any action for infringment until the provisions of the Act with respect to the deposit of copies have been complied with.

For the foregoing reasons it is believed that a rehearing in the present case would be in the public interest.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

MARCH 1939.

APPENDIX

TREASURY DEPARTMENT,
Washington, Feb. 24, 1938.

MY DEAR MR. ATTORNEY GENERAL: My attention has been invited to the case of *The Washingtonian Publishing Company, Inc.*, v. *Drew Pearson, et al.*, decided by the Supreme Court of the United States on January 30, 1939.

In this case the court held that the appellant was entitled to protection against copyright infringement from the date of publication of the material in question with the statutory notice of the copyright claim printed thereon, and that suit for infringement could be maintained if copies of the copyrighted material were deposited in the copyright office before the institution of suit, notwithstanding there had been no such deposit prior to the time of the alleged infringement.

Section 30 of the Copyright Law (U. S. Code, title 17, sec. 30) prohibits the importation of piratical copies of any work copyrighted in the United States. Section 31 of the same law (U. S. Code, title 17, sec. 31) provides that during the existence of an American copyright in any book, the importation into the United States of any piratical copies thereof, or of any copies thereof which have not been produced in accordance with the manufacturing conditions specified in section 15 of the Copyright Law (U. S. Code, title 17, sec. 15), is prohibited. The only means the Treasury Department has for determining the existence of an American

copyright of any book or other work are the catalogues of copyright entries furnished by the copyright office pursuant to section 57 of the Copyright Law (U. S. Code, title 17, sec. 57). The copyright office advises that no listings are or can be made in such catalogues until the copyrighted material is deposited with the copyright office in conformity with section 11 or 12 of the Copyright Law (U. S. Code, title 17, secs. 11 and 12).

It might appear that the law as construed by the court in its decision of January 30, 1939, above mentioned, permits a situation to arise in which the Treasury Department may be under the statutory duty of prohibiting the importation of piratical copies of books or other works when it would have no reasonable means of determining the piratical character of the imported articles. This would seem to be the unavoidable conclusion unless it can be held that the prohibition of importation is an "action or proceeding * * * for infringement of copyright" within the meaning of the last sentence of section 12 of the Copyright Law (U. S. Code, title 17, sec. 12) which can not be maintained until the provisions of the Copyright Law with respect to the deposit of copies and registration of such work shall have been complied with. See *Ebeling & Ruess, Inc.* v. *William H. Biester, collector of customs, etc.*, and *Wright, Tyndale & Van Roden, Inc.* (D. C. E. D. Pa., 1935) 28 U. S. Patent Quarterly 366.

As some uncertainty and possible difficulty for the Treasury Department might result from the construction of law adopted by the court in the *Washingtonian* case, I shall appreciate your advice as to whether any further litigation or new legisla-

tion to resolve the questions I have touched upon is contemplated.

Very truly yours,

(Signed) H. MORGENTHAU, Jr.,
Secretary.

The Honorable THE ATTORNEY GENERAL
OF THE UNITED STATES.

UNITED STATES SENATE,
COMMITTEE ON THE LIBRARY,
February 24, 1939.

Honorable FRANK MURPHY,
The Attorney General, Washington, D. C.

MY DEAR MR. ATTORNEY GENERAL: At a meeting of the Joint Committee on the Library held today, the motion was unanimously adopted expressing it as the sense of the Joint Committee that the Government should intervene in the application for the rehearing before the Supreme Court in the case of *The Washingtonian Publishing Company, Inc., Petitioner,* vs. *Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., et al.,* in which an opinion was rendered on January 30, 1939.

The result of this decision will be to affect very materially the revenues of the Library of Congress through the Copyright Division because it will not be necessary for applicants for copyrights to file copies of their products and pay the fees unless and until they desire to bring suit for infringement.

The Joint Committee expressed no interest in the private phases of this litigation between the parties, but it expresses concern over the effect the decision will have upon the revenues of the Library because if this decision sustains as the proper inter-

pretation of the present law, it will be necessary for Congress to amend the law in order to avoid the effects referred to. For this reason the Joint Committee felt at liberty to express the view that the Government should intervene to protect its interests in the pending motion for a rehearing.

Very sincerely yours,

FOR THE JOINT COMMITTEE ON THE LIBRARY,
By (Signed) ALBEN W. BARKLEY, *Chairman.*

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D. C., February 22, 1939.

Honorable FRANK MURPHY,
Attorney General, Washington, D. C.

MY DEAR MURPHY: May I not call your attention to the recent decision of the Supreme Court in the case of the *Washingtonian Publishing Company, Inc.* vs. *Drew Pearson, et al.*

Of course as a public official I have neither the right nor desire to one way or another affect any decisions of the Supreme Court as between individuals. But there are many cases in which the Government is not a party to the litigation, but in which the opponents are not only not the only parties involved, but as in this case they are not even the principal parties at interest, but the Government itself, though not represented technically, is much more interested than either or both the litigants involved.

To illustrate my meaning, the Copyright Division of the Library of Congress took in last year more than $298,000 in fees paid to that office. This

amount not only paid the entire expense of the Copyright Division, but turned in a surplus to the Treasury of $56,000. If the decision of the Supreme Court in the above-entitled case should operate as everyone seems to think, it will reduce the income of the Copyright Division to probably ten per cent of last year's receipts. Not only that, it will deny to the Library a large part of the books which come to the Library as part of the Copyright arrangement, and which in themselves have a very large monetary value, and a much greater value from a library standpoint.

I cannot conceive of a decision that would be more disastrous to this great Institution than the one here in question.

The right of the author is by no means the sole right involved. The concomitant right of the people is correctly indicated by the provision in Section 13 which provides that if the author does not finally comply with all of the provisions of the law he loses all right which he held subject to the act of compliance. It seems to me absolutely necessary that the Supreme Court should pass on the meaning of the word "promptly" as used in Section 12 of the Act, and this for many reasons which may not affect the individual litigants in this case, but which does affect and will continue to affect the administration of the Copyright Division of the Library of Congress, and therefore the whole Library.

What I mean is this: If the Court should hold that the word "promptly" should mean what it says, and as all our previous laws indicated, as intended, then another practice to which I here

call your attention would be prevented, as follows: During the past year four hundred inquiries for books which were supposed to be copyrighted has been called to the attention of the Copyright Division through the absence of the cards in the card index of the Library, showing the books in question were not actually registered, that no deposit had been made and no fee paid.

Now it is certainly true that where four hundred who are presented with a little printed notice to the disadvantage of the Government are caught, that there are very probably many thousands who are never caught. If the word "promptly" is given its full meaning, as the Congress must have intended it should be, the validity of the notice would of course be put under question, and knowing this, those thousands who are defrauding the Government of its just dues and books would no longer attempt such nefarious practices.

It further seems to me that the intention is perfectly clear as set out in Section 12 which says "No action or proceedings shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to deposit of copies of registration of such work shall have been complied with." If this were construed, as it seems to me the Congress intended, and as I feel is well within the right of the Court to interpret it, would in every way help the Government in its receipts both of books and money.

It may occur to one that the best way to clear the interpretation of the Supreme Court as it now stands would be to amend the law. But, in my judgment, there are two reasons against that: The

first one it seems to me no property owner should be permitted to take advantage of his own laches. Secondly, the difficulty of writing a law, that may not be again interpreted contrary to what I think is the intention of the Congress as in the present Act. Third, the promulgation of such a bill would unquestionably bring up a long and tedious argument of the points of the original bill, and finally endanger any amendments to the law which a forthright decision of the word "promptly" to mean "promptly" would make unnecessary.

It is for these reasons that the Committee on the Library of the House of Representatives suggests that the Justice Department petition for rehearing of the case in the interest of the United States Government itself, and ask for such interpretation as will protect the rights of the people, as seems simple enough to do if the Court agree that the rights of the Government are paramount to individual litigants in this case.

I am writing this at the request of the Committee on the Library of the House of Representatives of which I have the honor to be chairman. Thanking you for consideration of this, I am

Sincerely yours,

(Signed) KENT E. KELLER,
Kent E. Keller, M. C.

U. S. GOVERNMENT PRINTING OFFICE, 1939

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pp. 10 discuss

SUPREME COURT OF THE UNITED STATES.

No. 222.—October Term, 1938.

The Washingtonian Publishing Company, Inc., Petitioner,
vs.
Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., et al.

Certiorari to the United States Court of Appeals for the District of Columbia.

[January 30, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

By this suit, instituted in the District of Columbia, March 8, 1933, petitioner seeks an injunction, damages, etc., because of alleged unauthorized use of a magazine article copyrighted under Act March 4, 1909 (Ch. 320, 35 Stat. 1075, U. S. C. A. Title 17). Pertinent portions of the statute are in the margin.[1] *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 33[illegible]346; *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 188.

[1] Act March 4, 1909—

Sec. 1. That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work; . . .

Sec. 3. That the copyright provided by this Act shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. The copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this Act.

Sec. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author.

Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, . . .

Sec. 10. That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act.

Sec. 12. That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published. . . . No action or proceeding shall be maintained for infringement of copyright in any work until the pro-

The trial court sustained petitioner's claim and directed ascertainment of profits, damages, etc. The Court of Appeals ruled that as copies of the magazine had not been *promptly* deposited in the Copyright Office as directed by section twelve the action

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visions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

Sec. 13. That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

Sec. 18. That the notice of copyright required by section nine of this Act shall consist either of the word "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. . . .

Sec. 20. That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it. . . .

Sec. 22. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

Sec. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by the author of such work if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then by the author's

could not be maintained. It accordingly reversed the decree of the trial court and remanded the cause.

The record discloses—

December 10, 1931, petitioner published an issue of "The Washingtonian," a monthly magazine, and claimed copyright by printing thereon the required statutory notice. Fourteen months later,

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executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided, however*, That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided*, That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) To an injunction restraining such infringement;

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . .

Sec. 27. That the proceedings for an injunction, damages, and profits, and those for the seizure of infringing copies, plates, molds, matrices, and so forth, aforementioned, may be united in one action.

Sec. 54. That the register of copyrights shall provide and keep such record books in the copyright office as are required to carry out the provisions of this Act, and whenever deposit has been made in the copyright office of a copy of any work under the provisions of this Act he shall make entry thereof.

Sec. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain his name and address, . . . Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration.

Sec. 59. That of the articles deposited in the copyright office under the provisions of the copyright laws of the United States or of this Act, the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the law library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

Sec. 60. That of any articles undisposed of as above provided, together with all titles and correspondence relating thereto, the Librarian of Congress and the register of copyrights jointly shall, at suitable intervals, determine what of these received during any period of years is desirable or useful to preserve in the permanent files of the copyright office, and, after due notice as hereinafter provided, may within their discretion cause the remaining articles and other things to be destroyed: . . .

Sec. 62. That in the interpretation and construction of this Act "the date of publication" shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority, and the word "author" shall include an employer in the case of works made for hire.

February 21, 1933, copies were first deposited in the Copyright Office and a certificate of registration secured. This suit followed March 8, 1933.

In August, 1932, Liveright, Inc., published and offered for general sale a book written by two of the respondents and printed by another, which contained material substantially identical with an article contained in The Washingtonian of December, 1931. The usual notice claimed copyright of this book. August 26, 1932, copies were deposited in the Copyright Office and certificate of registration issued.

Respondents concede that petitioner secured upon publication a valid copyright of The Washingtonian. But they insist that although prompt deposit of copies is not prerequisite to copyright, no action can be maintained because of infringement prior in date to a tardy deposit. Counsel assert—"The very foundation of the right to maintain an action for infringement is deposit of copies and registration of the work. Neither of these has the slightest bearing upon the creation of the copyright itself under section nine. That is obtained merely by publication with notice as required by the Act." Also, "If copies were not deposited promptly after publication the opportunity to comply with the requirement of promptness was gone forever as to that particular work."

Petitioner submits that under the statute *prompt* deposit of copies is not prerequisite to an action for infringement; and that under the facts here disclosed deposit before suit was enough.

The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; "to afford greater encouragement to the production of literary works of lasting benefit to the world."[2]

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[2] See Act of March 3, 1891, Ch. 565, 26 Stat. 1106; Goubaud *v.* Wallace (1877), 36 Law Times (N. S.) 704, 705; 25 W. R. 604; Cate *v.* Devon and Exeter Constitutional Newspaper Co. (1889), L. R. 40 Ch. D. 500, 37 W. R. 487, 58 L. J. Ch. 288, 60 L. T. 672, 5 T. L. R. 229; Lumiere *v.* Pathé Exchange (1921), 275 Fed. 428; Mittenthal *v.* Berlin (1923), 291 Fed. 714.

Also Report of House Committee on Patents, February 22, 1909 (No. 2222). Among other things this says—

"Sections 12 and 13 deal with the deposit of copies, and should be considered together. They materially alter the existing law, which provides that in order to make the copyright valid there must be deposited two complete copies of the book or other article not later than the date of first publication. The failure of a shipping clerk to see that the copies go promptly forward to

Under the old Act deposit of the work was essential to the existence of copyright. This requirement caused serious difficulties and unfortunate losses. (See H. R. Report note 2.) The present statute (sec. 9) declares—"Any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act [sec. 18]; . . . ." And respondents rightly say "It is no longer necessary to deposit anything to secure a copyright of a published work, but only to publish with the notice of copyright."

Section 10 declares—

"That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the register of copyrights shall issue to him the certificate provided for in section fifty-five of this Act."

Section 12—

"That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office or in the mail addressed to the register of copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, . . . No action or proceeding shall be maintained for infringement of copyright in any work until the

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Washington may destroy a copyright of great value, and many copyrights have been lost because by some accident or mistake this requirement was not complied with. The committee felt that some modification of this drastic provision, under which the delay of a single day might destroy a copyright, might well be made. The bill reported by the committee provides that there shall be 'promptly' deposited in the copyright office, or in the mail, addressed to the register of copyrights, two complete copies of the best edition then published, and that no action or proceeding shall be maintained for the infringement of copyright in any work until the provisions with respect to the deposit of copies and the registration of such work shall have been complied with.

"If the works are not promptly deposited, we provide that the register of copyrights may at any time after publication of the work, upon actual notice, require the proprietor of the copyright to deposit, and then in default of deposit of copies of the work within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void. It was suggested that the forfeiture of the copyright for failure to deposit copies was too drastic a remedy, but your committee feel that in many cases it will be the only effective remedy: certainly the provision for compelling the deposit of copies by the imposition of a fine would be absolutely unavailing should the copyright proprietor be the citizen or subject of a foreign state."

provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with."

Section 13—

"That should the copies called for by section twelve of this Act not be promptly deposited as herein provided, the register of copyrights may at any time after the publication of the work, upon actual notice, require the proprietor of the copyright to deposit them, and after the said demand shall have been made, in default of the deposit of copies of the work within three months from any part of the United States, . . . the proprietor of the copyright shall be liable to a fine of one hundred dollars and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void."

Sections fifty-nine and sixty were new legislation. They show clearly enough that deposit of copies is not required primarily in order to insure a complete, permanent collection of all copyrighted works open to the public. Deposited copies may be distributed or destroyed under the direction of the Librarian[3] and this is incompatible with the notion that copies are now required in order that the subject matter of protected works may always be available for information and to prevent unconscious infringement.

Although immediately upon publication of The Washingtonian for December, 1931, petitioner secured copyright of the articles therein, respondents maintain that through failure promptly to deposit copies in the Copyright Office the right to sue for infringement was lost. In effect, that the provision in section twelve relative to suits should be treated as though it contained the words "promptly" also "unless" instead of "until", and read—No action or proceeding shall be maintained for infringement of copyright in any work *unless* the provisions of this Act with respect to the deposit of copies *promptly* and registration of such work shall have been complied with.

Plausible arguments in support of this view were advanced by the Court of Appeals. We think, however, its adoption would not square with the words actually used in the statute, would cause conflict with its general purpose, and in practice produce unfortunate consequences. We cannot accept it.

Petitioner's claim of copyright came to fruition immediately upon publication. Without further notice it was good against all

[3] See Report Register Copyrights for 1938. During the year there were 166,248 registrations; 194,433 current articles deposited were transferred to the Library of Congress. Also 3612 motion picture films, and 43,302 deposits from other classes were returned to the authors or proprietors.

the world. Its value depended upon the possibility of enforcement.

The use of the word "until" in section twelve rather than "unless" indicates that mere delay in making deposit of copies was not enough to cause forfeiture of the right theretofore distinctly granted.

Section twelve provides "That after copyright has been secured by publication of the work with the notice of copyright as provided in section nine of this Act, there shall be promptly deposited in the copyright office" two copies, etc. The Act nowhere defines "promptly" and to make the continued existence of copyright depend upon promptness would lead to unfortunate uncertainty and confusion. The great number of copyrights annually obtained is indicated by note 3, *supra*. The difficulties consequent upon the former requirement of deposit before publication is pointed out in the Committee Report. These would be enlarged if whenever effort is made to vindicate a copyright it would become necessary to show deposits were made promptly after publication especially since there is no definition of "promptly".

Section thirteen authorizes the register of copyrights to give notice if he finds undue delay and to require deposit of copies. Upon failure to comply within three months the proprietor shall be subject to a fine and the copyright shall become void. Evidently mere delay does not necessarily invalidate the copyright; its existence for three months after actual notice is recognized. Without right of vindication a copyright is valueless. It would be going too far to infer that tardiness alone destroys something valuable both to proprietor and the public.

Section twenty saves the copyright notwithstanding omission of notice; section twenty-three declares "That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: . . ." Furthermore, proper publication gives notice to all the world that immediate copyright exists. One charged with such notice is not injured by mere failure to deposit copies. The duty not to infringe is unaffected thereby. A certificate of registation provided for by section fifty-five apparently may be obtained at any time and becomes evidence of the facts stated therein.

Sections 23 and 24, which permit renewal of a copyright by application and registration within its last year although the deposited

copyrighted publication may have been disposed of under Sections 59-60, give clear indication that the requirement for deposit is not for the purpose of a permanent record of copyrighted publications and that such record is not indispensable to the existence of the copyright.[4]

The penalty for delay clearly specified in section thirteen is adequate for punishment of delinquents and to enforce contributions of desirable books to the Library. To give section twelve a more drastic effect would tend to defeat the broad purpose of the enactment. The Report of the Congressional Committee points out that forfeiture after notice and three months' further delay was thought too severe by some. Nowhere does it suggest approval of the much more drastic result now insisted upon by respondents.

Read together as the Committee which reported the bill said they should be, sections twelve and thirteen show, we think, the Congress intended that prompt deposit when deemed necessary should be enforced through actual notice by the register; also that while no action can be maintained before copies are actually deposited, mere delay will not destroy the right to sue. Such forfeitures are never to be inferred from doubtful language.

This view is in accord with the interpretation of somewhat similar provisions of the English Copyright Act. *Goubaud* v. *Wallace* and *Cate* v. *Devon Constitutional Newspaper Co., supra.* Also with the conclusions reached in *Lumiere* v. *Pathé Exchange* and *Mittenthal* v. *Berlin, supra.*

The challenged decree must be reversed. The cause will be remanded to the District Court.

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[4] For Statement of the views of the Copyright Office concerning Act of 1909 and practice thereunder See, Letter from the Register of Copyrights to the Librarian of Congress dated September 17, 1938, printed at the Government Printing Office 1938. The following appears therein—(p. 20)

"The failure to make deposit within the proper time does not in itself invalidate the copyright which has already been secured by publication with notice; this can now result only after failure to make deposit upon actual notice as provided in section 13.

"It is true that Section 12 provides that no action or proceeding shall be maintained for infringement until the 'deposit of copies and registration' have taken place, which presumably was added as a special inducement to make prompt deposit; but this does not answer the question.

"Heretofore, the practice of the office has been to accept copies at any time subsequent to publication with notice; thus, in effect, attaching no significance to the word 'promptly'; and certain decisions of the courts seem to sanction the practice . . . .

"It seems very desirable to remove this doubt and uncertainty by eliminating the word 'promptly' from Section 12, leaving Section 13 as heretofore to take care of any delinquent. . . ."

SUPREME COURT OF THE UNITED STATES.

No. 222.—October Term, 1938.

The Washingtonian Publishing Company, Inc., Petitioner,
vs.
Drew Pearson, Robert S. Allen, and Van Rees Press, Inc., et al.

Certiorari to the United States Court of Appeals for the District of Columbia.

[January 30, 1939.]

Mr. Justice Black, dissenting.

The opening words of the 1909 copyright law,[1] under which petitioner here claims, grant the privilege of copyright only to those who have complied "with the provisions of this Act." The provisions of that 1909 Act, of the first copyright Act of 1790,[2] and of every copyright Act passed since 1790, have required that copies of a copyrighted article be delivered to a designated governmental depository. Until today, this Court has never permitted recovery for infringement of a copyright unless the statutory requirement for deposit had been complied with in the manner and within the time required by the governing copyright statute. The 1909 Act —governing the present case—requires that "after copyright has been secured by publication of the work with the notice of copyright as provided in Section 9 of this Act, there shall be *promptly* deposited in the copyright office or in the mail addressed to the register of copyrights, . . . two complete copies of the best edition thereof then published, . . ." (Italics supplied.)

It is admitted that petitioner did not comply with the statute by prompt deposit of two copies of its work. Fourteen months elapsed between the date of publication and the date of deposit. Petitioner's asserted monopoly rights rest solely on the statute[3] and petitioner disobeyed the statute's requirements. Notwithstanding this disobedience, petitioner is here permitted to collect damages under the statute, even for alleged infringement committed in the

[1] 35 Stat. 1075.

[2] 1 Stat. 124, 125.

[3] Banks *v.* Manchester, 128 U. S. 244; Caliga *v.* Inter Ocean Newspaper, 215 U. S. 182, 188; Bobbs-Merrill Co. *v.* Straus, 210 U. S. 339, 346; Globe Newspaper Co. *v.* Walker, 210 U. S. 356, 367.

fourteen month period during which the statute's express command was continuously disregarded by petitioner. This century and a half old statutory requirement for public deposit of a copyrighted article provided a public record for the public's benefit. It imposes a simple and easily performed duty—not burdensome in any respect—in return for a twenty-eight year monopoly, with right of renewal for twenty-eight more years. To permit recovery here protects the copyright owner's statutory privilege of monopoly, but emasculates the statutory provisions designed—for over a century and a half—to protect the public.

The judgment here rests upon the conclusions: (1) that the statute grants a copyright from the date of first publication with notice; (2) that after deposits are made the statute permits a retroactive recovery for public use of an article of which copies were never promptly deposited as required by the statute; (3) that Section 13 provides an exclusive penalty for failure to make the deposit; and (4) that—according to administrative interpretation of the Act—deposits are not essential. These conclusions are not in harmony with the historic policy of the copyright law.

First. There is no novelty in the requirement of the Act of 1909 that deposit of copies shall be made after the copyright has already been secured. Every copyright Act, including the original Act of 1790, provided for a copyright interest which (as in the 1909 Act) vested prior to the time by which the last deposit was required. True, the 1909 Act grants a copyright upon first publication, that is, before the date on which deposit is required. But all of the previous Acts granted a copyright interest "from the [time of] recording the title" of an article, and recording always took place before the date by which the last deposits were required.[4] And

[4] Section 4 of the first Act of 1790, 1 Stat. 124, 125, required the last deposit of one copy of the copyrighted article "within six months after the publishing thereof . . . ;" Section 4 of the Act of 1831, 4 Stat. 436, 437, required the last deposit to be made "within three months from the publication . . . ; Section 10 of the Act of 1846, 9 Stat. 102, 106, required the last deposits to be made "within three months from the publication . . . ;" Section 2 of the Act of 1865, 13 Stat. 540, required the last deposit to be made "within one month of the date of publication . . . ;" the Act of 1867, 14 Stat. 395, required deposit "within one month after publication . . . ;" Section 93 of the Act of 1870, 16 Stat. 213, required the last deposits "within ten days after . . . publication . . . ;" Revised Statutes of 1878, No. 4956, required deposit "within ten days from the publication . . . ;" Section 3 of the Act of 1891, 26 Stat. 1106, required deposit "not later than the day of publication . . . ;" Section 12 of the Act of 1909, 35 Stat. 1078, provides that "after copyright . . . , there shall be promptly deposited . . . ."

while a copyright interest under the Acts prior to that of 1909—as in that Act—thus vested before the last deposits were required, this Court uniformly held that under these Acts "conditions subsequent" providing for deposits were actually "conditions precedent" to the perfection of the copyright. Construing the requirement of deposits in the Acts of 1790 and 1802, this Court said: "The answer is, that this is not a technical grant of precedent and subsequent conditions. *All the conditions are important;* the law requires them to be performed; *and, consequently, their performance is essential to a perfect title. On the performance of a part of them, the right vests:* and this was essential to its protection under the statute; *but other acts are to be done, unless congress have legislated in vain, to render the right perfect.*" (Italics supplied.)[5]

The 1831 Act was also construed by this Court as follows: "Although under § 6 of the . . . act, the exclusive right to the *copyright vests upon the recording of the title to the book,* and runs for the prescribed period from that date, and although the right of action for infringement, under § 6, also accrues at that time, yet it is quite clear, that, under § 4, in respect at least to suits brought after three months from the publication of the book, [within which the 1831 Act required deposit] it must be shown, as a condition to maintain the suit, that a copy of the book was delivered to the clerk of the District Court within three months from the publication. . . . Undoubtedly, *the three conditions* prescribed by the statute, namely, the deposit before publication of the printed copy of the title of the book, the giving of information of the copyright by the insertion of the notice on the title-page or the next page, and the depositing of a copy of the book within three months after the publication, *are conditions precedent to the perfection of the copyright.*" (Italics supplied.)[6]

Second. All copyright laws before 1891 had required deposit within some designated period after publication. The Act of 1891, however, required deposit "not later than the date of [first] publication." The Joint Committee on the bill which became the 1909 Act considered this requirement too drastic because "the delay of

[5] Wheaton and Donaldson *v.* Peters and Grigg, 8 Peters 591, 665.

[6] Callaghan *v.* Myers, 128 U. S. 617, 651, 652; cf. Merrell *v.* Tice, 104 U. S. 557; Thompson *v.* Hubbard, 131 U. S. 123, 150.

a single day" (after publication) in making the deposit "might destroy a copyright." Instead of requiring deposit within a fixed number of days, or by the date of publication, the bill as reported, and the 1909 Act as passed, permitted a copyright to be perfected by a "prompt deposit" after publication. The Committee did not recommend, nor did Congress provide that copyright could be perfected without deposit; the Committee did recommend, and Congress enacted an extension of the time for deposit.

In considering what Congress meant by continuing in the 1909 revision of the copyright laws the requirement for the deposit of copies, "we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed."[7] Prior to the 1909 Act this Court had construed provisions for deposit as essential requirements to the perfection of copyright, whether considered as conditions precedent or subsequent.[8] The Committee reporting the 1909 Act pointed out that "Under existing law [the 1891 Act] the filing of title and deposit of copies on or before the date of first publication are *conditions precedent,* and any failure to comply with them works a forfeiture of the copyright. It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice, and the other formalities become *conditions subsequent.*"[9]

"A condition precedent is one which must happen or be performed before the estate to which it is annexed can vest" or which must be performed "before some right dependent thereon accrues."[10] A "condition subsequent is one annexed to an estate already vested, . . . and by the failure or non-performance of which it is defeated."[11]

It is clear that Congress intended that the requirement as to deposits must be complied with in order to perfect the copyright interest under the 1909 Act. Any other construction runs counter to the policy of the copyright law and rewards disobedience to plain statutory provisions.

Only compelling language could justify the conclusion that Congress intended to abandon a statutory policy—in effect since 1790—which required owners of patent or copyright monopolies to disclose upon the public records the extent of their claimed monopolies.

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7 Kepner v. United States, 195 U. S. 100, 121.

8 See notes 5, 6, *supra.*

9 House Rep. No. 2222, 60th Cong., 2nd Sess.

10 Black's Law Dictionary, 3rd Ed., West Publishing Co., 1933.

11 *Id.*

Under the prevailing judgment here, public deposit and public registration are no longer necessary in order to obtain rights under the copyright law. And without deposit and registration, there need be no public disclosure of the day or the year of publication (by which copyright is obtained) of many copyrighted works. Under Section 18—the only mandatory provision for public disclosure now left unimpaired—many types of copyright will be obtained merely by marking publications with the name of the proprietor and the word "Copyright", "Copyr.", or "C". Hereafter, there need be no public (or even private) record of the beginning and the ending of many of these monopolies. And it is unreasonable to assume that an owner of a copyright will voluntarily make the extent and limitations of his monopoly more public than the law requires. Congress did not intend to enshroud copyright monopolies in such secrecy (See Sections 16, 23, 55, 62). If disobedience of the statutory requirement is to be rewarded, the reward should certainly be limited—as the Court of Appeals held—so that a desposit which does not comply with the law could not be given retroactive operation permitting recovery of damages for public use during the period of disobedience.

Third. Section 12 of the 1909 Act—requiring registration and prompt deposit, after publication, of two complete copies of the best edition of a copyrighted article—provides that no action or proceeding shall be maintained for copyright infringement until the required copies are deposited and the article registered with the register of copyrights. Under Section 13, if the copies are not promptly deposited after publication, the register of copyrights may demand deposit by the proprietor. If deposit is not then made within three months, the proprietor is liable to a fine of $100.00 and payment to the Library of Congress of twice the amount of the retail price of the best edition of the article, and the copyright becomes void for all purposes. It is suggested that Section 13 provides the sole and exclusive penalty for failure to comply with the statutory requirement of prompt deposit of copies. But this ignores one of the two distinct purposes of Congress in requiring deposits of copies in the 1909 Act and in all preceding copyright Acts. First, the deposit is intended to record publicly full and complete information about a work for which copyright is claimed and to make that work continuously available for public inspection in order that the extent and boundaries of the monopoly may be

understood by the public at all times during the life of the copyright. The judgment here renders this primary Congressional purpose ineffective. Second, Congress intended to preserve "desirable or useful"[12] works in a governmental agency dedicated to the diffusion of public knowledge. In furtherance of this second purpose the Act of 1909,—as did other Acts since 1846—required copies to be deposited with the Library of Congress. These two separate and distinct purposes have been manifested by Congress sometimes in different sections of a single copyright statute and at other times in separate Acts.

To effectuate the first purpose, that is, to notify the public of the existence and extent of a copyright monopoly, the first Act of 1790 required deposit, public recording and registration in a District Court, and publication in a newspaper; the Act of 1831 required deposit with the Clerk of a District Court (without penalty for failure to deposit); the Act of 1870 required deposit of one copy of the title with the Librarian of Congress *before* publication and two copies of the article within ten days after publication without provision for money penalty for failure to comply; Section 4956 of the Revised Statutes (1878) required deposit of one copy of the title *before* publication and two copies of the work after publication. Deposit has served as an integral part of every legislative plan to give the public full information of copyright monopolies. These plans have included deposits, registration, notice on the copyrighted article itself and full publication in newspapers. Deposit, registration and notice on the article—which every prior copyright Act required—are specifically provided for in the 1909 Act.

To effectuate the second purpose, that is, to preserve worthy works for the diffusion of knowledge, the Act of 1790 made separate provision for delivery of an additional copy to the Secretary of State "to be preserved in his office;" in a non-copyright Act of 1846, (9 Stat. 102, 106) creating the Smithsonian Institute "for the diffusion of knowledge," Congress required deposit of separate copies with the Institute and with the Library of Congress; a special Act of 1865 (13 Stat. 540, the origin of Section 13 now considered) permitted a separate copy to be franked to the Library of Congress within a month of publication "for the use of said Library," gave the Librarian the right to demand this additional

[12] Section 60, Act of 1909.

copy, and penalized non-compliance with his demand by forfeiture of copyright; Section 93 of the Act of 1870 required two additional copies of the best edition to be delivered, within ten days after publication, to the Librarian of Congress, and (Section 94) "in default of such deposit" which was required for the benefit of the Library, a penalty of $25.00 could be collected by the Librarian of Congress; Section 4959 of the Revised Statutes (1878) required deposit of two additional separate copies of the best edition "within ten days from publication" with the Librarian of Congress, and Section 4960 extended the penalty of $25.00 to cover all failures to make deposits of copies.

Section 12 of the Act of 1909, following the provisions of the Act of 1891 (26 Stat. 1106) provided in a single Section for deposit of copies with the Librarian both for notice to the public and for use of the Library. Section 13 of the 1909 Act now provides in a single Section—as had Section 4960 of the Revised Statutes—a penalty for failure to make deposits which are required for the two purposes of notice to the public and use by the Library. Neither this Section 13 nor any of its legislative predecessors indicated a Congressional intent to abandon—as a condition to the perfection of a copyright—the requirement of deposits for the salutary purpose of providing adequate public records of the existence and continuing extent of copyright monopolies. Section 13 gives the Librarian of Congress authority to demand deposit of copies of every article on which copyright is claimed, adding an additional penalty for failure to comply with his demand. This additional penalty may be imposed whether the claimed copyright is valid or invalid, and does not nullify the mandatory provision of Section 12 requiring deposit of copies for the public benefit.

Section 12 itself provides that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with." Compliance with "the provisions of this Act" is made a condition of the right to sue, and the Act is not complied with by delaying fourteen months after publication before making deposit. The Act requires "prompt deposit."

It is said that two new Sections (59 and 60) of the 1909 Act indicate an intention of Congress to abandon the protective mandate for public record of copyright monopolies. These Sections

show a contrary purpose and distinctly mark the line between deposits for Library uses and deposits for public information.

Section 59 permits the Librarian of Congress acting alone to transfer deposited copies to other governmental libraries for their use. Since 1909, acting under this authority, the Librarian has distributed 186,037 volumes.[13]

Section 60 permits the Librarian (supervising both the Library and Copyright offices) acting jointly with the Register of Copyrights, (directly in charge of deposits for copyright purposes) to determine what deposits "received during *any period of years* it is desirable or useful to preserve in the *permanent files of the Copyright Office* . . . ." (Italics supplied.) After duly published notice to the public, and "specific notice to the copyright proprietor of record" other articles can be destroyed or returned to the proprietor "of record." But even as to articles destroyed or returned, public records of the copyright monopolies must be retained in the registration files (Sections 10, 11, 16, 45, 47, 53, 54, 55) and in the indices or catalogues (Section 56). All these records "shall be open to public inspection." (Section 58.) And—among other purposes—these records remain open to public inspection, in the event of a copyright renewal.

During the last forty-one years copyright registrations numbered over five million, and "have increased over five-fold."[14] In 1909, it was obviously necessary to enact legislation providing for disposal of some of the multitudinous accumulated copyrighted articles no longer necessary for the purpose of public disclosure. But far from showing a Congressional intent to permit copyright monopolies with no public governmental record available for public inspection, Sections 59 and 60 are the clearest and most conclusive evidence of a contrary purpose. They carried forward and emphasized once more the dual statutory purpose to require deposits for the use of the Library, and to preserve for the public the historic and wise policy that the ownership, nature and extent of private monopolies granted by government should always be spread upon government records open for public inspection.

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[13] The books were distributed to the Departments of Agriculture, Commerce, Navy, Treasury, Education; and to the Federal Trade Commission, Bureau of Standards, Army Medical Library, Walter Reed Hospital, Engineer School, Corps of Engineers, Soldiers' Home, District of Columbia Library and others. Annual Report, Register of Copyrights, 1938, p. 4.

[14] Annual Report, Register of Copyrights, 1938, p. 1.

Fourth. **There remains the suggestion that administrative interpretation of the 1909 Act lends support to the judgment here under which the statutory provisions for public registration and deposit are nullified. On the contrary, the rules and regulations promulgated by the Register of Copyrights under the 1909 Act have continuously and consistently recognized that registration and deposit are mandatory. From the first (1910) until the latest (1927) edition of these rules and regulations they have substantially provided as follows:**

"*Promptly* after first publication of the work with the copyright notice inscribed, two complete copies of the best edition of the work then published *must be sent* to the Copyright Office with the proper application for registration correctly filled out and a money order for the amount of the legal fee.

"The statute requires that the deposit of the copyrighted work shall be made 'promptly' which has been defined as 'without unnecessary delay.' It is not essential, however, that the deposit be made on the very day of publication." (Italics supplied.)[15]

But it is said that a letter from the Register of Copyrights to the Librarian of Congress—dated September 17, 1938—indicates a different interpretation of the Act by the Copyright Office. However, this letter does not purport to change the formal rules and regulations—in force and effect since 1910—which provide that deposit and registration "must" be "promptly" made. The 1909 Act gives the Register of Copyrights authority to promulgate rules and regulations but it does not give him authority to alter the law's meaning by communicating with the Librarian of Congress. Nor, in fact, does this letter represent an effort by the Register of Copyrights to change the rules and regulations dating from 1910. Practitioners in the Copyright Office, as well as the public generally, rely upon formal rules and regulations made available to the public. But whether they have access to interdepartmental communications such as the letter does not appear.

This interdepartmental communication bears the date of September 17, 1938. It appeared in public form for the first time January 4, 1939. Its appearance thus occurred nearly six years after the complaint in this suit was filed; more than eight months after the Circuit Court of Appeals decided that the statutory provisions for deposit were mandatory; almost three months after this Court granted certiorari; and twenty-nine days after the cause was argued

[15] Rules and Regulations of the Copyright Office, Bulletin No. 15, 1927. The word "promptly" was inserted in the first paragraph for the first time in 1917.

and submitted for final decision by this Court. The communication is admittedly contrary to the only two court decisions which it cites on the precise question of the effect of failure to make deposit.[16] It does not represent an administrative practice consistently pursued, or an administrative interpretation of long standing, and therefore is not entitled to any weight in the construction of the 1909 Act. The administrative rules and regulations—to which we may look—have since 1910 consistently required that deposit "must" be made.

It is of far greater importance to the public today than it was in 1790, 1831, 1870, or 1891, that public record be made of copyright monopolies granted to further the arts and sciences, since these privileges have been extended by statute to include almost every conceivable type of production of the human mind.[17] It has been well said that the "general rule of law is, that the noblest of human production—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[18] All voluntary communications become "free as the air to common use" unless protected by compliance with the copyright statutes. More than twenty-five years ago (1911) a careful and accurate survey of the copyright laws led to the conclusion that "For seventy-five years it has been the settled law of this country that protection under the copyright law is granted only to those who perform the conditions essential to a perfect copyright title."[19] No decision of this Court—previous to that of today—has questioned the consistent purpose of Congress to require "that the public should have notice, by a true and correct official registry, as to the real author or proprietor entitled to the enjoyment of such monopoly as against the public."[20] To grant monopoly privileges

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[16] Opinion of the court below; Ebeling & Reuss, Inc. *v.* Raff, unofficially reported, 28 United States Patent Quarterly, 366, (E. D., Penn.).

[17] The Act of 1909 as amended, 17 U. S. C., § 5, lists the following classes of works in which copyright may be claimed: Books, including composite and cyclopedic works, directories, gazetteers, and other compilations; Periodicals, including newspapers; Lectures, sermons, addresses (prepared for oral delivery); Dramatic or dramatico-musical compositions; Musical compositions; Maps; Works of art; models or designs for works of art; Reproductions of a work of art; Drawings or plastic works of a scientific or technical character; Photographs; Prints and pictorial illustrations; Motion-picture photoplays; Motion pictures other than photoplays.

[18] Brandeis, J., dissenting, International News Service *v.* Associated Press, 248 U. S. 215, 250.

[19] Louis de Jonge & Co. *v.* Breuker & Kessler Co., 191 Fed. 35, 36.

[20] Koppel *v.* Downey, 11 Appeal D. C. 93, 104.

—by judicial construction—to those who fail to comply with statutory safeguards intended to protect the public against abuses of such privileges conflicts with statutory policy extending back to the beginning of the nation's history. An author is entitled to the benefit of every right afforded by copyright law, but only "upon complying with the provisions of" that law. Congress has provided for a grant of monopoly privileges under copyright for a term which may extend by renewal to fifty-six years for those who do comply. Petitioner having conceded that it disobeyed a plain requirement of the Act designed to inform and protect the public, I cannot agree that it should recover damages under the very law it admittedly disobeyed.

Mr. Justice ROBERTS and Mr. Justice REED concur in this dissent.